CONSULTATION

Criminal Law

CONSENT AND OFFENCES AGAINST THE PERSON

A Consultation Paper

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The Law Commission

Consultation Paper No 134

Criminal Law

Consent and Offences against the Person

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CONSENT AND OFFENCES AGAINST THE PERSON

PART I

THE SCOPE AND NATURE OF THE PROJECT

Introduction

1.1 In the course of preparing our recent report on Offences against the Person[1] we had to consider the effect of the consent of the victim on liability for the infliction of physical hurt or injury. We took the view that the Criminal Law Bill attached to that report, and implementing its recommendations, should reproduce the present common law on this question.

1.2 That law has two, distinct, features.[2] First, in the case of assault, but not of more serious offences against the person,[3] no offence is committed[4] if the victim[5] consented to what was done, and the act done was not intended or likely to cause actual bodily harm. That is a matter of common law; but we felt able to express this general rule in clause 6(1) of the Criminal Law Bill that forms part of Law Com No 218 in these terms:

> A person is guilty of the offence of assault if-
>
> (a) he intentionally or recklessly applies force to or causes an impact on the body of another-
>
> (i) without the consent of the other, or
>
> (ii) where the act is intended or likely to cause injury, with or without the consent of the other.[6]

[1] *Legislating the Criminal Code: Offences against the Person and General Principles*, Law Com No 218, November 1993: hereafter "Law Com No 218".

[2] The clearest and most authoritative source for this statement, before the very recent judgments in the House of Lords in *Brown* [1993] 2 WLR 556, is the judgment delivered by Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715, in particular at p 719C-F.

[3] As to these, see further para 1.7 below.

[4] We use this neutral expression to leave open the question of whether, where the consent of the victim operates to preclude liability for assault, it does so because the prosecution has failed to establish an essential element of the *offence*; or because the accused has a valid *defence*.

[5] We use the term "victim", here and throughout, for convenience. We acknowledge that it has connotations of reluctance or oppression that are not appropriate in many of the cases that we review. "Astonishing though it may seem, the persons involved positively wanted, asked for, the acts to be done to them": [1993] 2 WLR 556 at p 607C, *per* Lord Slynn of Hadley.

[6] This formulation was cited with approval, as a statement of the present law, by Lord Lowry in *Brown* [1993] 2 WLR 556 at p 578B-C.

1.3 The other aspect of the law is somewhat different. There are certain situations in which conduct that would normally be an assault under the above rubric, or a more serious offence, is not criminal because of the circumstances in which it takes place. These exceptions from the general rule of liability were summarised in *Attorney-General's Reference (No 6 of 1980)* as follows:

> "Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."[7]

1.4 In preparing the Criminal Law Bill we were minded to think that these exceptions should be left to be developed by the common law of defences or exceptions, which is only affected by that Bill to the extent that specific common law defences, for instance the defence of duress, are replaced by a statutory defence. That was the approach that we recommended in our consultation paper that preceded the Criminal Law Bill.[8] We were, however, impressed by the response from commentators on that consultation paper who argued that the objective of reviewing the whole of the criminal law, with a view to putting it on a statutory basis, would not be adequately achieved unless all the common law rules referred to above were subjected to critical scrutiny, in order to see whether it was possible to reach agreement on their limits and express them in statutory terms.

1.5 In response to those urgings, therefore, we initiated the present project. Force had been added to the calls for a review of the law by the judgments delivered in the House of Lords, after the publication of our Consultation Paper No 122, in the sado-masochism case of *Brown*.[9] That case surveyed the whole field of consent and exception in offences against the person in much more detail than any previous authority; and, while the speeches of the majority confirmed the broad outlines of the law as set out above, there was considerable disagreement about its basis, policy, detailed limits and possible future development.

1.6 In the meanwhile, however, the Criminal Law Bill presented with Law Com No 218 maintains the common law position as it was confirmed in *Brown*. That Bill is entirely complete and coherent in itself, and can be legislated in advance of any conclusions reached at the end of the present study: which may, of course, confirm that the common law position is the best, or only practicable, position for the law to adopt. However, should that not be the outcome of this study, it will be a comparatively simple matter to amend the Criminal Law Bill, or any legislation based on it, to add whatever statutory provisions this study suggests to be desirable.

[7] [1981] QB 715 at p 719D-E.

[8] Law Commission Consultation Paper No 122 (1992), at para 10.1.

[9] [1993] 2 WLR 556.

1.7 Our recommendations in Law Com No 218 have one further implication for the present Paper. In that report we have strongly recommended the replacement of the present antique and confusing formulation of personal injury offences, above the level of common assault, that is now contained in sections 18, 20 and 47 of the Offences against the Person Act 1861, with three simply defined new offences: intentionally causing serious injury; recklessly causing serious injury; and intentionally or recklessly causing injury.[10] When considering how a law of consent would or might apply to force or impact more serious than that which founds an offence of assault, we will assume that the structure of offences and terminology of the law that applies to such force or impact will be that which we recommend in Law Com No 218.

The limits of this study

2.1 This study addresses the two issues set out above. First, should there be a *general* rule, and if so in what terms, as to the level of injury that may be inflicted, with the victim's consent, without the injurer incurring criminal liability? The present law on that subject is very briefly summarised in paragraph 1.2 above.

2.2 Second, in what particular situations, and according to what detailed rules, should it be permissible, so far as the criminal law is concerned, to inflict injury, including injury going beyond, and if so how far beyond, the injury permitted by the general rule referred to in paragraph 2.1 above?

2.3 This latter issue is sometimes referred to as involving, as does the general rule, the "consent" of the victim; but although it is convenient to group the whole of this project under that heading, further consideration shows that that approach demands considerable caution.

2.4 If reference is made to the categories of exception listed in paragraph 1.3 above, it will be seen that many of them do not turn in any real sense on the consent of the victim. Thus any exemption from criminal liability for "lawful correction" of children by parents or persons *in loco parentis* has nothing to do with consent;[11] and while doctors are undoubtedly exempt from criminal liability for acts done in the course of lawful medical or surgical treatment that would otherwise be serious assaults, for instance the amputation of a limb, the consent of the patient to the injury may usually be a necessary, but it is certainly not a sufficient, condition of that exemption.[12]

2.5 Moreover, even in the case of (most) games and sports, whilst a pre-condition, taken for granted, of exemption from criminal liability for injuries incurred is the willing participation of the players, it is difficult to say that a player who is in fact injured, for

[10] For a full exposition of the terms and implications of these new offences, see Law Com No 218, paras 13.1-17.1.

[11] *Per* Lord Mustill in *Brown* [1993] 2 WLR 556 at p 593H.

[12] *Ibid*, at p 593F.

instance by being hit by the ball in cricket or falling heavily in a tackle in rugby, has consented to *that* injury. Rather, insofar as the injurer's exemption rests at all on the victim's consent, it is consent to the *risk* of a comparatively wide range of injury.

2.6 In the present project we therefore proceed as follows. We first consider the general rule of exemption, and raise for consultation whether it should be amended. That issue is important in itself, but also important as a background to consideration of the special cases of exception.

2.7 Within the latter, we do not address further the two categories of exemption of lawful correction and lawful medical treatment. As we have observed, neither of these, though for somewhat different reasons, depend on consent; and both, and particularly lawful correction, raise complex issues of policy that go very far beyond the issues that we address in this Paper.

2.8 It is, however, appropriate to address the category of sports and games; and also the other cases that at present do or may provide some sort of exemption at common law, including horseplay; consensual casual fighting; voluntary participation in dangerous exhibitions or displays; religious mortification; and tattooing and similar treatment.

2.9 However, we should note here that boxing (injuries inflicted in the course of which are undoubtedly lawful at common law) presents a particular problem, since as we explain in paragraphs 10.19-10.22 below boxing falls outside all of the general tests that we feel able to propose for the definition of activities in which it should be lawful to inflict injury. Our conclusion is that boxing, if it is to remain lawful, can only do so by the application of public policy considerations that are particular to that sport. Since that is a matter of pure policy, divorced from the more general considerations addressed in this Consultation Paper, we do not think that it would be helpful for us to add to the already formidable public debate on the issue. We confine ourselves to demonstrating that without what appears to be the present policy of the law to treat boxing as a special and privileged case, participants in the sport when injuring or killing other competitors would be guilty of crimes of the most serious nature, including (where death is caused) murder.

The structure of this Paper

3.1 Accordingly, Part II of the Paper surveys the present law on both the branches of the subject mentioned above; and Part III reviews the possible options for reform of all aspects of the law addressed in Part II. That discussion of options for reform also embraces the difficult questions of the distinction, if any, between types of consent that are and are not operative in law; and of what factors, such as deceit, threats or over-persuasion, should vitiate the effect of consent given by the victim. We also comment on issues arising under the European Convention on Human Rights. Part IV of the Paper then summarises the issues that we raise for consultation.

PART II

THE PRESENT LAW

Introduction

4.1 We deal first with the general rule, described briefly in paragraph 1.2 above, that provides that no offence is committed if harm of a minor and limited kind is inflicted with the consent of the victim. We then turn to the different aspect of the law, that in certain specific cases injury of a higher degree than that just mentioned may be inflicted without criminal liability arising. That aspect of the present law was briefly set out in paragraph 1.3 above. In addressing that part of the present law we exclude the two special cases, lawful medical treatment and lawful correction, that are not considered in this study.

4.2 The terms of the general rule were before *Brown*,[13] and in the event still are, clear: that, outside the special categories, a person cannot effectively consent to the intended or actual infliction on him of "actual bodily harm" or, in the more modern language that we adopt in Law Com No 218, injury. Authority for that proposition is, however, remarkably sparse; and that lack of clear authority gave rise in *Brown* not only to disagreement as to whether the rule was correctly stated, but also to detailed enquiry as to the basis of and justification for the rule itself. Although the outcome of that enquiry was to leave the existing law intact, it raised many issues of importance from the point of view of law reform; and it will therefore be necessary to explain that enquiry, and the materials on which it was based, in some detail.

The development of the general rule

The law before Brown

5.1 The main authorities in the field before *Brown* were *Coney*;[14] *Donovan*;[15] and *Attorney-General's Reference (No 6 of 1980)*.[16] Because of the attention that has been paid to these cases in later discussions of the law it is necessary to go into them at some length; though, as will be seen, in *Attorney-General's Reference* the Court of Appeal in effect rewrote the law in terms that, while broadly in tune with the earlier authorities, certainly did not directly reproduce their approach or wording.[17]

[13] [1993] 2 WLR 556.

[14] (1882) 8 QBD 534.

[15] [1934] 2 KB 498.

[16] [1981] QB 715.

[17] "The diversity of view expressed in the previous decisions, such as [*Coney* and *Donovan*], make some selection and a partly new approach necessary" : *per* Lord Lane CJ at [1981] QB 715 at p 719A. See also the comment on this case by Lord Mustill in *Brown* [1993] 2 WLR 556 at p 596G.

5.2 *Coney*. This case, although much relied on in discussions of the subject of consent, in truth addresses a very particular problem, and gives little guidance as to the terms of any general rule.[18] The actual issue in the case was the liability of a number of spectators at a prize-fight for common assault, on the basis that they were secondary participants, as aiders and abettors of whatever offence was inherent in the fight. That may have caused a greater emphasis than there would otherwise have been on the *public* implications of the spectacle.

5.3 It was held by all eleven judges that prize-fights were illegal, and that consent to the interchange of blows during the fight did not afford any answer to the criminal charge of assault. The reasons given for the decision, however, varied -

Cave J:

> "a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport, and not likely, nor intended to cause bodily harm, is not an assault, and that, an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial."[19]

Matthew J:

> "no consent can render that innocent which is in fact dangerous... . The fists of trained pugilists are dangerous weapons which they are not at liberty to use against each other."[20]

Stephen J:

> "When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defence to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, as well as to the person injured. But the injuries given and received in prize-fights are injurious to the public both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize-fights are disorderly exhibitions, mischievous on many obvious grounds."[21]

He then continued,

[18] That was recognised in *Brown*, even by judges who upheld the general rule that had previously been thought to spring, at least indirectly, from *Coney*: see Lord Jauncey at [1993] 2 WLR 556 at p 570B-C, and Lord Lowry, *ibid*, at p 578D.

[19] At p 539.

[20] At p 547.

[21] At p 549.

"In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending upon circumstances."[22]

Hawkins J:

"As a general proposition it is undoubtedly true that there can be no assault unless the act charged as such be done without consent... for want of consent is an essential element in every assault... . [I]t is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of the peace; so as to bar a criminal prosecution."[23]

Lord Coleridge CJ:

"the combatants in a prize fight [cannot] give consent to one another to commit that which the law has repeatedly held to be a breach of the peace. An individual cannot by such consent destroy the right of the Crown to protect the public and keep the peace."[24]

5.4 It is possible to reconstruct out of these and other observations the proposition that even in respect of a charge of common assault the consent of the victim is no defence if the acts of the assaulter are dangerous, in the sense of being likely or intended to cause harm. However, the real thrust of the judgments is to emphasise two further propositions. First, that whilst there might be exceptions to the general rule limiting the effect of consent in the case of lawful sports, or other activities in the public interest, prize-fighting emphatically did not fall within that category: far from being in the public interest, a prize fight constituted a breach of the peace, as tending towards public disorder. Second, and much more fundamentally, prize-fighting, because of its element of public disorder, was an activity unlawful in itself. Therefore, as it would seem at least from the extracts from the judgments of Lord Coleridge CJ and Hawkins and Stephen JJ cited above, prize-fighting was taken out even of any general rule that recognised consent as effective up to an, admittedly very limited, level of injury. On this view, because of the inherently unlawful nature of prize-fighting all the participants, and spectators, were acting unlawfully, and therefore no consent to any injury could be effective in law.

[22] At p 549.

[23] At p 553.

[24] At p 567.

5.5 *Donovan.*[25] The appellant was charged with indecent assault and common assault after caning a girl of seventeen for purposes of sexual gratification. He pleaded in defence that she had consented, and the chairman of quarter sessions in summing-up directed the jury that "consent or no consent" was the vital issue in the case. The Court of Criminal Appeal held that this was a misdirection. The question should have first been put to the jury of whether the blows struck were likely or intended to do bodily harm. The Court continued:

> "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can license another to commit a crime. So far as the criminal law is concerned, therefore, where the act charged is in itself unlawful, it can never be necessary to prove absence of consent... . As a general rule, although it is a rule to which there are well established exceptions, it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."[26]

5.6 The first part of this formulation has, with some justice, been criticised as tautologous.[27] Nevertheless, the ratio is clear enough: as a general rule, it is not possible to consent to the infliction, or the likelihood, of bodily harm.

5.7 The judgment in *Donovan* recognised the existence of various exceptions to that general rule that an act likely or intended to cause bodily harm is an unlawful act: such as cudgels, foils or wrestling, and rough and undisciplined sport or play where there is no intent to cause harm. There was, however, no difficulty in seeing that Mr Donovan could claim no such indulgence:

> "In the present case it was not in dispute that the motive of the appellant was to gratify his own perverted desires. If, in the course of so doing, he acted so as to cause bodily harm, he cannot plead his corrupt motive as an excuse... . Nothing could be more absurd or repellent to the ordinary intelligence than to regard his conduct as comparable with that of a participant in one of those 'manly diversions'."[28]

5.8 *Attorney-General's Reference (No. 6 of 1980).*[29] It was held in this case, the main authority before *Brown*, that where two persons fight (otherwise than in the course of properly conducted games and sports) intending or causing actual bodily harm, it is not a defence for one of those persons to a charge of assault arising out the fight that the

[25] [1934] 2 KB 498.

[26] At p 507.

[27] Eg by Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715 at p 718G.

[28] [1934] 2 KB 498 at p 509.

[29] [1981] QB 715.

other consented to the fight, whether the fight occurs in private or in public. It was not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Lord Lane CJ's succinct restatement of these principles deserves fairly full citation:

> "We think that it can be taken as a starting point that it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim; and it is doubtless for this reason that the burden lies on the prosecution to negative consent. Ordinarily, then, if the victim consents, the assailant is not guilty. But the cases show that the courts will make an exception to this principle where the public interest requires... starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: at what point does the public interest require the court to hold otherwise? In answering this question the diversity of view expressed in the previous decisions, such as the [*Coney* and *Donovan*] make some selection and a partly new approach necessary. Accordingly we have not followed the dicta which would make an act, (even if consensual), an assault if it occurred in public, on the grounds that it constituted a breach of the peace, and was therefore itself unlawful. These dicta reflect the conditions of the times when they were uttered... . The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason... .
>
> Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases."[30]

5.9 The basic proposition established by *Attorney-General's Reference (No 6 of 1980)*, was therefore that where an action was intended or likely to cause injury, consent was no defence unless there was a good reason to allow consent to the activity in question.[31]

5.10 One final point which remained was whether consent is indeed a *defence* in certain circumstances, or whether lack of consent forms part of the positive definition of an assault, so that it is for the prosecution in every case to prove such lack of consent. In *Donovan* Swift J said that:

[30] At pp 718D-719E.

[31] This view was also adopted by the Court of Appeal (Criminal Division) in *Boyea* (28 January 1992, unreported).

"First it was of importance that the jury should be left in no doubt as to the incidence of the burden of proof in relation to consent. In *May*[32] the principle applicable to cases of this kind was laid down in these words:

> 'The Court is of the opinion that if the facts proved in the evidence are such that the jury can reasonably find consent, there ought to be a direction by the judge on that question, both as to the onus of negativing consent being on the prosecution and as to the evidence in the particular case bearing on the question.'"[33]

This approach mirrors the statement of Lord Lane in *Attorney-General's Reference (No 6 of 1980)* cited in paragraph 5.8 above that, in relation to *assaults*, it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim. In assault, therefore, the burden lies on the prosecution to negative consent. It is not clear where the burden lies when the injuries inflicted go beyond the minimum required for a charge of assault, but the accused seeks the protection of one of the specially excepted categories referred to by Lord Lane CJ at the end of his judgment.

The decision of the House of Lords in Brown[34]: *background*

6.1 The Court of Appeal certified the following point of law of general public importance.

> "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences against the Person Act 1861?"

It was held by three votes (Lords Templeman, Jauncey and Lowry) to two (Lords Mustill and Slynn) that this question should be answered in the negative.

6.2 The case raised serious issues as to the desirability and legitimacy, from a social point of view, of sado-masochistic acts inflicting injury in private.[35] Those issues, and the facts or speculations informing them, were ventilated at some length in at least some of

[32] [1912] 3 KB 572 at p 575.

[33] [1934] 2 KB 498 at p 504.

[34] [1993] 2 WLR 556.

[35] Although Lord Slynn of Hadley, when discussing, at p 606G, the possible policy limitations on a defence of consent, attached some importance to the question of whether the acts complained of took place in public or in private, the other judges followed Lord Lane CJ, cited at para 5.8 above, in thinking that liability under the general law of assault or violence should not depend on where the acts inflicting the injury took place. That, with respect, is clearly right. If particular objection attaches to violent conduct because it takes place in public, that objection should be addressed either by the law of public order or, in the case of sexual or sexually-related conduct, by the law of indecency. The only relevance in *Brown* of the fact that the acts complained of took place in private is that, had they taken place in public, the participants might have been charged with other offences, that did not raise the issues of consensual violence.

the speeches.[36] However, such issues, important though they are, were only incidental to the question that the House had to determine. As Lord Slynn of Hadley put it:

> "The determination of the appeal, however, does not depend on bewilderment or revulsion or whether the right approach for the House in the appeal ought to be liberal or otherwise. The sole question is whether, when a charge of assault is laid under the two sections in question,[37] consent is relevant in the sense either that the prosecution must prove a lack of consent on the part of the person to whom the act is done or that the existence of consent by such person constitutes a defence for the person charged."[38]

6.3 That question turned on, and was resolved by, consideration of whether the law as formulated in *Attorney-General's Reference (No 6 of 1980)* was correct. If that statement of the law was correct, in the sense that as a general rule consent on the part of the victim was irrelevant if actual bodily harm or injury was inflicted or threatened, then the accused in *Brown* could only escape liability if their conduct fell within a special category of activity to which the general rule did not apply. If, however, there was no such general rule, then the issue became one of public policy, within the framework of a protean assumption that the state should not interfere with an individual's choice to consent to injury without strong reason.[39]

6.4 Because of the controversial nature of sado-masochistic behaviour, and the virtual impossibility within the confines of a criminal trial of forming any reliably-based view as to the public dangers or implications of that conduct in general, the conclusion reached as to the underlying law decided the appeal in *Brown*. Once the majority had decided that, in broad terms, the position adopted in *Attorney-General's Reference (No 6 of 1980)* was correct, then it unsurprisingly followed that they felt themselves unable to recognise, or were even positively opposed to recognising, a special category of exception for sado-masochistic behaviour that would have placed it on the same footing as lawful sports and games.[40] By contrast Lord Mustill, who did not accept the correctness of the majority's

[36] Thus Lord Templeman, at pp 564D-565F, pointed to the degrading nature of some of the practices involved; the danger of corruption of younger participants; and the threat of serious injury or infection, including the transmission of the HIV virus. Lord Mustill, at pp 600F-601G, acknowledged the importance of such issues, but pointed out that little or no evidence to enable a view to be taken on them was before the House. If protection against such dangers was required, that should be done by specific statutory provision, and not by what his Lordship saw as an extension of the general law of assault.

[37] That is, ss 20 and 47 of the Offences against the Person Act 1861.

[38] [1993] 2 WLR 556 at p 603B.

[39] *Per* Lord Mustill, at p 600A.

[40] That was the position that even Lord Mustill would have taken, on the assumption, which he did not accept, that special circumstances had to be shown to exculpate the appellants. As he explained at p 600D-E: "If it were to be held that as a matter of law all infliction of bodily harm above the level of common assault is incapable of being legitimated by consent, except in special circumstances, then we would have to consider whether the public interest required the recognition of private sexual activities as being in a specially exempt category... . I would not

statement of the underlying law, considered that no sufficient reason had been demonstrated for the criminal law to intervene in what he considered to be a matter of private morality.[41]

6.5 For the majority, therefore, a general theory does and should exist, that draws a line at the degree and extent of harm or injury that the victim can consent to in order to exclude criminal liability on the part of the injurer. It is, however, instructive from the point of view of future policy to consider in some detail how that conclusion was reached. The majority by no means felt themselves coerced to that conclusion simply by the somewhat exiguous authority to which we have made reference above. It is important also to include in this survey the considerations adduced by Lord Slynn of Hadley. He, like the majority, accepted the approach through a general rule making the victim's consent irrelevant to liability, but would have drawn that line not at actual, but at serious, bodily harm,[42] a view that led to his allowing the appeal in respect of the particular injuries inflicted in *Brown* without having to treat sado-masochistic behaviour as a special case.

6.6 We therefore now set out the various considerations relied on in *Brown* in the step-by-step manner by which the majority of the judges approach the question.

(i) A line can be drawn above which consent is no defence

7.1 The first stage in this analysis is to accept that whilst consent is a defence to common assault, consent will not provide a defence in all cases. It is widely recognised that consent to being killed is ineffective and, below this, a line must be drawn somewhere along the continuum from minor touching to death. Above this line consent will ordinarily not be a defence. This form of analysis was clearly adopted by Lords Jauncey, Lowry and Slynn.

Lord Jauncey:

> "All the appellants recognised... that there must be some limitation upon the harm which an individual could consent to receive at the hand of another. The line between injuries to the infliction of which an individual could consent and injuries to whose

be prepared to answer [that question] in favour of the appellants, not because I do not have my own opinions upon it but because I regard the task as one which the courts are not suited to perform, and which should be carried out, if at all, by Parliament after a thorough review of all the medical, social, moral and political issues, such as was performed by the Wolfenden Committee. Thus, if I had begun from the same point of departure as my noble and learned friend Lord Jauncey of Tulichettle, I would have arrived at a similar conclusion; but differing from him on the present state of the law I venture to differ".

[41] At p 599H.

[42] At p 608A: "My conclusion is thus that as the law stands, adults can consent to acts done in private which do not result in serious bodily harm, so that such acts do not constitute criminal assaults for the purposes of the Act of 1861".

infliction he could not consent must be drawn it was argued where the public interest required."[43]

Lord Lowry:

"Everyone agrees that consent remains a complete defence to a charge of common assault and nearly everyone agrees that consent of the victim is not a defence to a charge of inflicting really serious personal injury (or 'grievous bodily harm'). The disagreement concerns offences which occasion actual bodily harm... ."[44]

Lord Slynn:

"Three propositions seem to me to be clear. It is 'inherent in the conception of assault and battery that the victim does not consent' Glanville Williams 'Consent and Public Policy' [1962] Crim LR 74, 75. Secondly, consent must be full and free and must be as to the actual level of force used or pain inflicted. Thirdly, there exist areas where the law disregards the victim's consent even where that consent is freely and fully given. These areas may relate to the person (e.g. a child); they may relate to the place (e.g. in public) ; they may relate to the nature of the harm done. It is the latter which is in issue in the present case. I accept that consent cannot be said simply to be a defence to any act which one person does to another. A line has to be drawn as to what can and cannot be the subject of consent."[45]

(ii) The line should be drawn at actual bodily harm

7.2 The majority, having recognised that such a line can be drawn, then held that the cut off point was to be actual bodily harm. They therefore recognised that, in the absence of special circumstances, public policy dictates that consent will provide no defence to charges under section 47 or 20, both these charges requiring at least actual bodily harm.

7.3 Lord Lowry gained support for this view from the structure of the 1861 Act as well as from the cases. He acknowledged that the Act was an untidy attempt at codifying the law which could be described as 'piecemeal legislation', a 'rag-bag of offences brought together from a wide variety of sources with no attempt... to introduce consistency as to substance or as to form'.[46] However, while admitting that any indications to be gathered from the Act of 1861 are not precise, he went on to consider the Act in some detail:

[43] At p 567C-E.

[44] At pp 575H-576A.

[45] At p 605C-D.

[46] At p 576E-F. These defects in the legislation of 1861 are part of the reason for this Commission having strongly recommended, in Law Com No 218, the replacement of that legislation by a rational and modern scheme.

"I consider that [the Act of 1861] contains fairly clear signs that, with regard to the relevance of the victim's consent as a defence, assault occasioning actual bodily harm and wounding which results in actual bodily harm are not 'offences below the line', to be ranked with common assault as offences in connection with which the victim's consent provides a defence, but offences 'above the line', to be ranked with inflicting grievous bodily harm and the other more serious offences in connection with which the victim's consent does not provide a defence."[47]

Lord Lowry noted the following points about the structure of the Act:

1. Section 18 offences were felonies, while section 47 and section 20 offences were misdemeanours. Therefore, section 20 was not associated with section 18 and separated from section 47 by categorisation.
2. Although section 47 appears to describe a less serious offence than section 20, the maximum penalty was the same.
3. The wounding in sections 18 and 20 may occasion actual bodily harm or grievous bodily harm. Any rule based on serious bodily harm would, therefore, require the line to be drawn somewhere down the middle of section 20.
4. Section 20 does not envisage the jury having to find out whether anything more than actual bodily harm was occasioned.
5. That consent is a defence to a charge of common assault is a common law doctrine which the Act of 1861 has done nothing to change.

7.4 Lord Jauncey relied more heavily on the cases discussed above:

"Although the reasoning in [*Donovan* and *Attorney-General's Reference (No 6 of 1980)*] differs somewhat, the conclusion from each of them is clear, namely, that the infliction of bodily harm without good reason is unlawful and that consent of the victim is irrelevant. In *Boyea* (unreported), 28th January 1992, Glidewell LJ giving the judgment of the Court of Appeal (Criminal Division) said :

'The central proposition in *Donovan* [1934] 2 KB 498 is in our view consistent with the decision of the court in *A.G.'s Reference (No 6 of 1980)* [1981] QB 715. That proposition can be expressed as follows : an assault intended or which is likely to cause bodily harm, accompanied by indecency, is an offence irrespective of consent, provided that the injury is not 'transient or trifling.'"[48]

7.5 Lord Jauncey noted that in *Donovan*, *Attorney-General's Reference (No 6 of 1980)* and *Boyea* the infliction of actual bodily harm was considered to be sufficient to negative any consent. Cave J in *Coney* also appeared to take the same view. On the other hand,

[47] At pp 576G-577A.

[48] At p 572A-C.

Stephen J in *Coney* appeared to consider that it required serious danger to life and limb to negative consent. As to that, Lord Jauncey concluded:

> "I prefer the reasoning of Cave J in *Coney* and of the Court of Appeal in the later three English cases which I consider to have been correctly decided. In my view the line falls properly to be drawn between assault at common law and the offence of assault occasioning actual bodily harm created by section 47 of the Offences against the Person Act 1861, with the result that consent of the victim is no answer to anyone charged with the latter offence or with a contravention of section 20 unless the circumstances fall within one of the well known exceptions such as organised sporting contests or games, parental chastisement or reasonable surgery... . If consent is to answer a charge under section 47 but not one under section 20, considerable practical problems would arise."[49]

7.6 While Lord Templeman reaches the same conclusion as Lords Lowry and Jauncey, in doing so he placed weight on the *lawfulness* of the activity involved:

> "In some circumstances violence is not punishable under the criminal law. Where no actual bodily harm is caused, the consent of the person affected precludes him from complaining. Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating.
>
> Surgery... ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities."[50]

Having set out the rule in these terms Lord Templeman explained *Coney* on the basis that:

> "a prize-fight being unlawful, actual bodily harm or serious bodily harm inflicted in the course of a prize-fight is unlawful notwithstanding the consent of the protagonists."[51]

He went on to find support for this proposition from the reasoning in *Donovan*[52] (described as tautologous in *Attorney-General's Reference (No 6 of 1980)*), that:

[49] At p 573A-C.

[50] At p 560D-F.

[51] At p 562A-B.

[52] [1934] 2 KB 498 at p 507.

"it is an unlawful act to beat another person with such a degree of violence that the infliction of bodily harm is a probable consequence, and when such an act is proved, consent is immaterial."

On this view, the explanation of the decision in *Attorney-General's Reference (No 6 of 1980)* was that fighting was unlawful, and the consent of the protagonists affords no defence to charges of causing actual bodily harm, wounding or grievous bodily harm in the course of an unlawful activity.[53]

7.7 This concentration on the lawfulness of the act in question can be interpreted in two ways. In an unspecific sense, as was presumably intended in *Donovan*, it might simply refer to the fact that some actions, such as the caning in *Donovan*, where injury is either intended or caused, are inherently unlawful, or *malum in se*, consent being no defence.[54] However, it may indicate that consent will provide no defence to a charge where the conduct in question is unlawful under *another* statute. This interpretation appears to be supported by Lord Templeman's enquiry as to whether the actions in question were unlawful under the law as to homosexual behaviour contained in the Sexual Offences Act 1967. However, he concluded[55] that the Act of 1967 is of no assistance for present purposes because the problem of sado-masochism was not under consideration when that Act was being formulated. The question of whether the defence of consent should be extended to the consequences of sado-masochistic encounters could only be decided, therefore, by considerations of policy and public interest.

7.8 Lord Jauncey by contrast made it clear that he did not rely on the possible illegality of the appellant's behaviour under the Sexual Offences Act;

"In reaching this conclusion I have not found it necessary to rely on the fact that the activities of the appellants were in any event unlawful inasmuch as they amounted to acts of gross indecency which, not having been committed in private, did not fall within section 1(1) of the Sexual Offences Act 1967."[56]

However, he did not rule out the possibility that the unlawfulness of the actions under a different statute may be relevant in other circumstances. Lord Slynn and Lord Mustill strongly doubted the validity of such an approach. Lord Slynn pointed to the inconsistent results that might result from the application of the 1967 Act,[57] and objected to the importation of such inconsistencies, which might be justified in the context of a statute

[53] [1993] 2 WLR 556 at p 562F.

[54] This explanation of the language used by the court in *Donovan* is advanced by Lord Lowry in *Brown* at p 580G-H.

[55] At p 563F-G.

[56] At p 573E-F.

[57] At pp 607G-608A.

dealing with sexual offences and public morality, into the entirely different question of the lawfulness of conduct under the Offences against the Person Act. Lord Mustill also pointed to the consequences of such a rule:

> "A question has arisen, not previously canvassed, whether the appellants are necessarily guilty because their acts were criminal apart from the Offences against the Person Act of 1861, and that accordingly a defence of consent which might otherwise be available as an answer to a charge under section 47 is to be ruled out. This proposition if correct will have some strange practical consequences... . I would therefore accede to this argument only if the decided cases so demand. In my opinion they do not... ."[58]

(iii) The line should be drawn at serious bodily harm

7.9 Apart from the limited reference to unlawfulness under other provisions, therefore, the majority espoused as the basic rule that consent provides no defence for any action that is intended or likely to cause actual bodily harm. Lord Slynn, however, differed from the majority on the question of where that line should be drawn above which consent will ordinarily provide no defence.

7.10 Lord Slynn considered[59] that none of *Coney*, *Donovan* or *Attorney-General's Reference (No 6 of 1980)*, are conclusive in resolving the present question, and that the matter had to be considered as one of principle. It was however relevant to the question of policy[60] to recall what was said by Stephen J in *Coney*:

> "In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like; but in all cases the question whether consent does or does not take from the application of force to another its illegal character, is a question of degree depending on circumstances."[61]

7.11 Lord Slynn concluded that it was possible to draw the line, and that the line should be drawn between really serious injury on the one hand and less serious injuries on the other. The range of injuries encompassed by actual bodily harm and wounding was wide, and there was no significant reason for refusing consent as a defence for the lesser of these cases.[62] Accordingly:

[58] At pp 597E-598B.

[59] At pp 603-605.

[60] At p 605E.

[61] (1882) 8 QBD 534 at p 549.

[62] [1993] 2 WLR 556 at pp 606B-D.

"My conclusion is on the basis of what I consider existing law to be. I do not consider that it is necessary for the House in its judicial capacity to give what is called 'a new ruling' based on freedom of expression, public opinion, and the consequences of a negative ruling on those whom it is said can only get satisfaction through these acts... . All these are essentially matters, in my view, to be balanced by the legislature if it is thought to be necessary to consider the making criminal of sado-masochistic acts per se."[63]

(iv) Lord Mustill's approach

7.12 Lord Mustill, in a wide-ranging speech, agreed that no conclusive guidance could be found from the decided cases. He, however, differed from the majority by considering whether it was possible to rationalise, under one general rule as to the relevance of consent, *all* the decided cases, both those relating to the *general* level of permitted injury and those relating to the special cases referred to in *Attorney-General's Reference (No 6 of 1980)*.[64] That approach departs from the traditional analysis adopted, in particular, in *Attorney-General's Reference*, and summarised for instance in paragraphs 1.2-1.3 above. We have to say that it is hardly surprising that such an endeavour failed. Lord Mustill's detailed analysis of the special exceptions to the general rule, on which we draw heavily in the next section of this Paper, very clearly shows that those exceptions are indeed exceptions, taken out of the general law on policy grounds, and many of them do not in reality turn on consent at all.[65]

7.13 Since the authorities did not yield any general rationalisation, Lord Mustill concluded that the House was not constrained from looking completely afresh at the question in the instant case, of whether the public interest required the criminalisation of the infliction of actual but not grievous bodily harm for reasons of sexual gratification with the willing consent of the victim.[66] In his view, and while in no way endorsing as morally acceptable the conduct of the appellants, the principle of restraint in interference by the state in the private lives of individuals led to the conclusion that the public interest did not require the appellants' conduct to be prohibited by the criminal law.[67]

Some comments on Brown

8.1 Lord Mustill approached the question in *Brown* from a different, and more general, basis than did the majority and Lord Slynn of Hadley, and his observations are not, therefore, a direct criticism of the specific conclusions reached by his brethren. The main burden of Lord Mustill's judgment is that there is no binding authority, and nothing in the basic

[63] At p 608A-C.

[64] See the analysis at pp 586B-587H.

[65] For the latter point, see the citations from Lord Mustill's speech on which we rely in para 2.4 above.

[66] [1993] 2 WLR 556 at p 599E.

[67] At pp 599G-600B.

structure of the law of offences against the person,[68] to compel a particular solution to the question of whether and to what extent the consent of the victim should exclude criminal liability on the part of the injurer. That broad conclusion is however not inconsistent with the conclusions of the other Law Lords in *Brown*. Lord Slynn of Hadley said in terms that the ultimate issue was one of policy.[69] And their Lordships who formed the majority, while not putting the matter in quite so direct a way,[70] certainly did not suggest that they were compelled to the solution that they reached by strictly legal, as opposed to policy, considerations.

8.2 That said, however, we consider that *Brown* not only is authority for the approach to the law under the two heads of general rule and exceptional situations that we summarised in paragraphs 1.2-1.3 above, but also positively demonstrates that that approach is conceptually necessary. Whatever the place at which the general line is drawn, the possibility of exceptional cases, that give consent a different application, must be retained; though the need to deal with such exceptional cases by special rules may in turn influence the terms and limits of the general rule.[71]

8.3 Therefore, having noted the conclusions reached in *Brown* as to the general rule, we turn now to the other part of the law, only indirectly discussed in that case, which deals with the special exceptions to that general rule.

Special categories: background

9.1 It has always been acknowledged that certain special categories of case exist which will be exceptions to the general rule recognised in *Brown*.[72] The exceptions suggested in early cases, such as *Coney*, mainly concerned forms of sporting activity. As Stephen J put it:

[68] None of the other Law Lords specifically commented on, or sought to emulate, Lord Lowry's detailed analysis of the present law of offences against the person, which we set out in some detail in para 7.3 above. We, however, have to say, with respect, that it is difficult to draw any conclusions from legislation that, as Lord Lowry pointed out, is arranged in a somewhat random way, with no discernible policy theme. Moreover, as we made clear in para 1.7 above, we put the present Paper forward on the assumption that any new law on consent will be legislated within the new general structure of offences against the person that we have strongly recommended in Law Com No 218.

[69] At p 608G: "I agree that in the end it is a matter of policy. It is a matter of policy in an area where social and moral factors are extremely important and where attitudes can change. In my opinion it is a matter of policy for the legislature to decide."

[70] Though it should be noted that the judges in the majority considered that if what would (on the view of the general rule that they adopted) be a special exemption for sado-masochistic practices were to be created, then that would be a clear act of policy, to be done only by Parliament and not by the courts: see in particular Lord Templeman at p 563G; and Lord Jauncey of Tullichettle at p 574G.

[71] See further para 11.23 below.

[72] [1993] 2 WLR 556.

"In cases where life and limb are exposed to no serious danger in the common course of things, I think that consent is a defence to a charge of assault, even when considerable force is used, as, for instance, in cases of wrestling, single-stick, sparring with gloves, football and the like."[73]

9.2 Similar exceptions were mentioned in *Donovan*, with the addition of horseplay and reasonable chastisement:

"There are, as we have said, well established exceptions to the general rule that an act likely or intended to cause bodily harm is an unlawful act. One of them is dealt with by Sir Michael Foster in [*Foster's Crown Law* (Third Edition) at p 259], where he refers to persons who, in perfect friendship, engage by mutual consent in contests, such as 'cudgels, foils or wrestling', which are capable of causing bodily harm... .

Another exception to the general rule, or rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm... .

It is not necessary to deal in this judgment with other exceptions to the rule which are wholly remote from the present case, such as the reasonable chastisement of a child by a parent or a person in loco parentis."[74]

9.3 The most modern general summary of the special situations of consensual violence is the frequently quoted statement of Lord Lane in *Attorney-General's Reference (No 6 of 1980)*;

"Nothing which we have said is intended to cast doubt on the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest in the other cases."[75]

9.4 This statement is, however, merely a summary; it does not set out at all the specific conditions for the legality of the various types of conduct referred to; and it does not purport to be exhaustive. In this part of the Paper, therefore, we have to investigate the actual or potential categories of exemption, and their particular rules, in much more detail. It will be recalled that we do not in this study address two of the categories of exemption referred to by Lord Lane, lawful correction and lawful medical treatment.[76]

[73] (1882) 8 QBD 534 at p 549.

[74] [1934] 2 KB 498 at pp 508-509.

[75] [1981] QB 715 at p 719D-E.

[76] See paras 2.4-2.7 above.

Of the categories that we survey by far the most substantial, and that which has excited the most discussion, is lawful sports and games.

Lawful sports and games[77]

Introduction

10.1 While it is undoubtedly the law that people can do things to each other in the course of sport that they could not do in a less formalised context, the basis and extent of this exemption is less clear. A number of possible justifications for regarding sporting activity as a distinct and special category have been proposed. Lord Jauncey in *Brown*[78] stressed that in sado-masochistic encounters there was no referee such as there would be in a boxing or football match. He, therefore, appeared to regard the formal structure of sports, with rules and referees, as an important factor. More antiquely, lawful sports have been approved of as "manly diversions, they tend to give strength, skill and activity, and may fit people for defence, public as well as personal, in times of need."[79]

10.2 The most authoritative statement of the problem is that of Lord Mustill in his discussion of contact sports in *Brown*:

> "Some sports, such as the various codes of football, have deliberate bodily contact as an essential element. They lie at a mid-point between fighting, where the participant knows that his opponent will try to harm him, and the milder sports where there is at most an acknowledgment that someone may be accidentally hurt. In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately. This simple analysis contains a number of difficult problems, which are discussed in a series of Canadian decisions, culminating in *Ciccarelli*[80] on the subject of ice hockey, a sport in which the ethos of physical contact is deeply entrenched. The courts appear to have started with the proposition that some level of violence is lawful if the recipient agrees to it, and have dealt with the question of excessive violence by enquiring whether the recipient could really have tacitly accepted a risk of violence at the level which actually occurred... . [In the present appeal] what we need to know is whether, notwithstanding the recipient's implied consent, there comes a point at which it is too severe for the law to tolerate. Whilst

[77] A very great deal of useful information is contained in Mr Edward Grayson's book *Sport and the Law* (1988), on which we have drawn for this section. We have not thought it appropriate to cite many of the cases, drawn from a wide range of sources, that Mr Grayson reports, but we certainly commend his study to readers who wish to go into the matter in more detail.

[78] [1993] 2 WLR 556 at p 567B.

[79] Sir M Foster *Crown Law*, (Third Edition), at p 260.

[80] (1989) 54 CCC (3d) 121.

common sense suggests that this must be so, and that the law will not license brutality under the name of sport, one of the very few reported indications of the point at which tolerable harm becomes intolerable violence is in the direction to the jury given by Bramwell LJ in *Bradshaw*[81] that the act (in this case a charge at football) would be unlawful if intended to cause 'serious hurt'. This accords with my own instinct, but I must recognise that a direction at nisi prius, even by a great judge, cannot be given the same weight as a judgment on appeal, consequent upon full argument and reflection."[82]

10.3 This statement indicates that there are a range of analytical problems, which are rarely clearly distinguished in the cases.

10.4 First, the role of consent in the case of sport is different from the role that it plays in, for instance, sado-masochistic encounters of the type that were in issue in *Brown*. In the latter case, the victim has consented to a specific course of conduct designed to produce physical contact or even injury, and the primary question[83] is simply whether his consent to that particular injury is a defence to charge of inflicting that injury. In most sports and games, however, the most that the victim has consented to is the *risk* of incurring a particular *type* of injury in the course of the game.

10.5 Second, although consent plays this somewhat different role in considering the legality of injuries inflicted in sports, it seems clear that an injury so inflicted would not be lawful if it were *not* of the type of which the victim had consented to take the risk. That in its turn reveals that the consent is not given, as it were, *ad hoc*, but is assumed or deemed to be given by the act of joining in an organised sport. Therefore, much will turn on the nature of the game and the expectations of those who play it. However, although not clearly articulated in the English cases, there is some disagreement as to how those "expectations" should be judged. We return to that point in paragraphs 10.7ff below.

10.6 Third, however, there is no suggestion that, by organising something described as a sport or game, the participants thereby automatically attract the sportsmens' immunity, whatever it may be, from criminal liability for injuring each other. The law clearly reserves the right to say that some activities do not qualify for special exemption at all; just as it reserves the right to say that, within even a lawful sport, public policy requires

[81] (1878) 14 Cox CC 83.

[82] [1993] 2 WLR 556 at pp 592H-593D.

[83] Note, however, that policy issues as to whether consent to specific injuries should be "lawful", in the sense of providing a defence to criminal charges, may be affected by the possibility in particular cases of the infliction of one injury carrying the risk of a further and more serious injury: in the case of sado-masochistic woundings, that the simple wounding might carry with it the risk, more serious to the health of the victim, of infection through contaminated instruments or blood. These considerations were stressed in *Brown* by Lord Templeman at p 565B-C and Lord Jauncey of Tullichettle at p 574A-B.

that injury caused by some of the sport's practices, even though accepted by the injured player, should be dealt with as criminal in nature.

"Consent" in sports and games

10.7 We indicated in paragraph 10.5 above that there is some uncertainty as to how the content of a particular sport, to which the participants may be said to have given their consent, is to be judged. English writers have tended to speak in largely subjective terms of the expectations of the particular players: "the players are even deemed to consent to an application of force that is in breach of the rules of the game, if it is the sort of thing that may be expected to happen during the game".[84] However, in the series of Canadian cases relating to ice-hockey, referred to by Lord Mustill in *Brown*,[85] a somewhat more objective approach has been taken.

10.8 It was stressed in *Cey*[86] that while "consent", being a state of mind, must normally be determined wholly subjectively, where the issue is implied consent in the context of an organised game the scope of that consent has to be determined by reference to objective criteria. That approach was followed in a full review of the law in *Ciccarelli*.[87] Cobbett J specifically declined to follow the formulation referred to in paragraph 10.7 above, and said[88]

> "I adopt the principle in *Cey* that the scope of implied consent in the context of a team sport, such as hockey, must be determined by reference to objective criteria. Such criteria include:
> (a) the nature of the game played; whether amateur or professional league or so on;
> (b) nature of the particular act or acts and their surrounding circumstances;
> (c) the degree of force employed;
> (d) the degree of risk of injury, and
> (e) the state of mind of the accused."

[84] Glanville Williams, "Consent and public policy" [1962] Crim LR 74 at p 81. See also Simon Gardiner, "Not playing the game: is it a crime?" [1993] SJ 628 at p 629. This also appears to be the approach of the Model Penal Code, s 2.11(2)(b) which, dealing with a general defence of consent to bodily injury, includes (actual) consent to conduct and injury that are "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport."

[85] See para 10.2 above.

[86] (1989) 48 CCC (3d) 480.

[87] (1989) 54 CCC (3d) 121. "Consent" was directly in issue in this case because the defendant was accused of common assault under s 244 of the Canadian Criminal Code, which prohibits the intentional application of force "without the consent of another person". However, the court's analysis seems to be directed also to cases where absence of consent is not part of the definition of the offence but, rather, positive consent on the part of the victim is relied on by way of defence.

[88] *Ibid*, at p 126

10.9 We agree with Lord Mustill in *Brown*[89] that this approach is relevant to the English, as well as to the Canadian, law. It stresses that the actual consent of the victim is not the dispositive consideration, but rather that the law will formulate a series of rules as to the permitted conduct of the inflicter of injury. The effect of those rules may be expressed as representing the limits of the deemed consent of the injured party, but in truth they are objective criteria imposed by the courts to limit the field of intervention of the criminal law. What is more difficult is to extract from such cases as exist what those criteria are, in any less general terms than was expressed in *Ciccarelli*. In the following sections we set out such guidelines as are available.

The rules of the game

10.10 It is tolerably clear that the *mere* fact that an act inflicting injury was outside the rules of the game will not in itself render the injury criminal. That was established in the manslaughter case of *Moore,*[90] where the accused knocked the deceased into the raised knee of the advancing goalkeeper and the trial judge directed the jury to disregard the rules of the game in deciding whether the accused had committed an unlawful and dangerous act. Conversely, however, "if a man is playing according to the rules and practice of the game and not going beyond it, it may be reasonable to infer that he is not actuated by any malicious motive or intention, and that he is not acting in a manner which he knows will be likely to be productive of death or injury".[91]

10.11 The latter conclusion may be easier to reach now than it was when first formulated in 1878. The injury inflicted in *Bradshaw* was by charging the deceased by kneeing him in the stomach, conduct said by one of the umpires of the game not to be unfair under the "Association rules" as they then were understood; and Bramwell LJ, in reviewing the evidence, said that "no doubt the game was in any circumstances, a rough one".[92] Now that all codes of football have emerged from their somewhat undisciplined early Victorian origins, dangerous or aggressive play is specifically forbidden by their rules.[93]

Intention and recklessness

10.12 Most attention has been focussed in recent years on the intentional infliction of injury in the course of rugby and, to a lesser extent, association football: often, though not always, in "off the ball" incidents. The Criminal Injuries Compensation Board, which

[89] See para 10.2 above.

[90] (1898) 14 TLR 229.

[91] *Per* Bramwell LJ in *Bradshaw* (1878) 14 Cox CC 83.

[92] *Ibid*, at p 85.

[93] A wide range of dangerous acts is specifically forbidden by Law XII of the Rules of Association Football; the particular conduct in *Bradshaw* would seem to outlawed by sub-laws *(c)* and *(d)*, the "Advice to Referees" appended to which (1993 edition, p 35) says "Jumping at an opponent and not jumping for the ball is a foul; there is no such thing as accidental jumping at an opponent". Law 26(3) of the Laws of the Game of Rugby Football 1993/94, similarly forbids a wide range of dangerous play, including, by sub-laws (3)(b)-(c), wilful hacking, kicking and tripping, and early, late or dangerous tackling.

has emphasised that criminal acts during sport are just as much the concern of the criminal law, and of its compensation system,[94] as are such acts perpetrated elsewhere, puts the matter thus:

> "In a sport in which bodily contact is a commonplace part of the game, the players consent to such contact even if, through unfortunate accident, injury, perhaps of a serious nature, may result. However, such players do not consent to being deliberately punched or kicked and such actions constitute an assault for which the Board would award compensation."[95]

10.13 This approach to intentional injury reflects that of the courts.[96] In *Johnson*[97] Lord Lane CJ observed that "unlawful violence ... on the football field needs discouraging as much as unlawful violence on the terraces or indeed anywhere else", and in *Lloyd*[98] the Court of Appeal, in upholding a sentence of eighteen months imprisonment, emphasised that while forceful contact was allowed by the rules of Rugby Union (and, *semble*, by the law), the game was not a licence for thuggery. Other cases, reported only on sentencing issues, reveal convictions for intentional injuries during football matches,[99] though *Lloyd* may mark something of a departure in sentencing policy, by imposing a sentence broadly commensurate with what a similar act would attract outside the sporting sphere.[100]

10.14 It is much more difficult to formulate any distinct rules, or indeed to lay one's hand on any clear authority, once one passes outside the area of *intentional* injury. However, and while exercising all the caution proper in approaching a direction to a jury given in a case over a hundred years old, it is notable that Bramwell LJ in *Bradshaw* characterised as

[94] "The phenomenon is not confined to professional soccer; amateur football, both association and rugby, is by no means immune and there are disturbing signs that the cricket field has growing problems in this respect": 16th Report, Accounts for the year ended 31 March 1980 (Cmnd 8081), para 29.

[95] Criminal Injuries Compensation Board 23rd Report, Accounts for the year ended 31 March 1987 (Cm 265), para 37.

[96] An early exploration of the issues was in the first instance case of *Billinghurst* [1978] Crim LR 553. The defendant broke the jaw of an opponent in a rugby match by punching him in an off-the-ball incident. A distinguished former Welsh rugby international gave evidence for the defence that in the modern game of rugby punching is the rule rather than the exception. Judge Rutter, while not appearing (from the abbreviated report to hand) to have made the specific distinction between intentional and other injury, did suggest to the jury that a distinction that they might regard as decisive was between force used in the course of play and force used outside the course of play. This approach seems specifically to have rejected the defence contention that the only test was whether the blow was outside the normal expectation of a person playing rugby: thus, we would suggest, fitting with the "objective" approach described in paras 10.8-10.9 above.

[97] (1986) 8 Cr App R (S) 343 at p 345: player in police rugby match bit opponent's ear.

[98] [1989] Crim LR 513: accused kicked the victim in the face as he lay on the ground.

[99] *Billinghurst* [1978] Crim LR 553, *Gingell* (1980) 2 Cr App R (S) 198, *Birkin* [1988] Crim LR 854, *Shervill* (1989) 11 Cr App R (S) 284, *Lincoln* (1990) 12 Cr App R (S) 250, *Davies* (1990) 12 Cr App R (S) 308.

[100] See the comment of the learned editor at [1989] Crim LR 514.

unlawful not only conduct intended to cause serious hurt,[101] but also conduct where the defendant "knew that, in charging as he did, he might produce serious injury and was indifferent and reckless as to whether he would produce serious injury or not".[102] It is submitted that that general view must be correct, at least to the extent that the possibility of convicting a sports player for reckless, as opposed to intentional, injury is not excluded. The thuggery that the Court of Appeal has rightly seen as criminal when committed on the sports field is not necessarily limited, and is not stated in any of the cases to be limited, to intentional injury. Admittedly, however, where injury is intentional, and a fortiori where although it occurs on the field of play it does not occur in the course of play, it is far easier to see that the injury should not benefit from any exception attaching to sports and games.

10.15 In considering this point, it is relevant to refer to the definition of recklessness contained, for the purposes of offences against the person, in clause 1(b)(ii) of the Criminal Law Bill included in Law Com No 218:

> "A person acts recklessly with respect to a result when he is aware of a risk that it will occur, and it is unreasonable, having regard to the circumstances known to him, to take that risk."[103]

10.16 In most games there is *some* risk of injury; and in "contact sports", conspicuously in all codes of football, risk that is more than merely negligible. However, just as we all accept some risk of injury in order to be able to conduct the ordinary affairs of life, so in order to enable what are generally beneficial organised sports to take place it is reasonable for the players to run risks of the degree normally inherent in those sports. The degree of risk, and the likely severity of the injury should the risked consequence occur, are, however, controlled by the manner in which the players play the game. Gratuitously aggressive and dangerous conduct, in tackling other players or competing for the ball, may well be characterised as the unreasonable taking of a risk, even within the extended limits of normally acceptable behaviour[104] that apply when playing a contact sport.

10.17 Thus, applying the normal approach to recklessness, based on unreasonable risk-taking, and without formulating any special exception for sports and games, it seems clear that even non-intentional aggression or dangerousness, which one would expect to be outside

[101] Cited on this point, again with proper caution, by Lord Mustill in *Brown* [1993] 2 WLR 556 at p 593D.

[102] (1878) 14 Cox CC 83 at p 85. The Court of Appeal (Criminal Division) confirmed in *Venna* [1976] 1 QB 421 at pp 428H-429A, that "recklessness" in *Bradshaw* means subjective recklessness as envisaged in *Cunningham* [1957] 2 QB 396.

[103] For an exposition of that definition, see Law Com No 218, paras 8.1-10.4.

[104] Thus, it is not acceptable in the ordinary affairs of life to seize another person by the legs and bear him to the ground: all that changes, however, when he is holding the ball in rugby football.

the rules laid down for the playing of the game,[105] can lead to criminal liability. That is a conclusion not based in any real sense on the consent of the victim, but on a more general assessment of what, in those particular circumstances, constitutes reasonable conduct.[106] Like all questions of reasonableness, its resolution is essentially a jury question.

Summary

10.18 The best that we can do, therefore, is to say that the present broad rules for sports and games appear to be: (i) the intentional infliction of injury enjoys no immunity; (ii) a decision as to whether the reckless infliction of injury is criminal is likely to be strongly influenced by whether the injury occurs during actual play, or in a moment of temper or over-excitement when play has ceased, or "off the ball"; (iii) although there is little authority on the point, principle demands that even during play injury that results from risk-taking by a player that is unreasonable, in the light of the conduct necessary to play the game properly, should also be criminal.

Boxing: an anomalous case

10.19 None of the foregoing applies to boxing, which is (nearly)[107] unique in making the intentional infliction of serious injury not only something that is permitted within the rules, but in reality the essence of the sport. Boxing originally appears to have been regarded as lawful not through any application of principle, or by reference to the legal rules applying to other sports, but simply because it was not the prize-fighting that had been declared unlawful, on grounds as much related to public order as to the law of offences against the person,[108] in *Coney*.[109]

10.20 The ultimate objective of every boxer is to knock his opponent out, conduct that almost inevitably involves the infliction of grievous bodily harm on the opponent, contrary to section 18 of the Offences against the Person Act 1861. That this conduct is inherently hostile is reinforced by the aggressive posture that appears often to be adopted before contests.[110] And the rules of the sport, or at least the way in which they are

[105] See para 10.11 above.

[106] See para 10.9 above.

[107] For a discussion of other violent sports see para 10.23 below.

[108] See para 5.4 above.

[109] (1882) 8 QBD 534.

[110] For instance, the World supermiddleweight championship bout between Chris Eubank and Michael Watson in 1991 was prefaced by an exchange of insults between the two protagonists couched in unmistakably minatory terms: see eg *The Times* 23 May 1991, p 39, and 8 August 1991, p 38. In the fight itself Mr Eubank inflicted neurological injuries of the utmost severity on Mr Watson, requiring brain surgery to remove a blood clot and resulting in prolonged coma. More recently, during the preparations for the bout for the same championship between Mr Eubank and Mr Nigel Benn, a Mr King, the promoter of the bout, was reported as saying of Mr Benn that his "frenzy is at such a state, he cannot control himself looking at Mr Eubank... he can't stand to face this man any longer without tearing him apart. We've got a hostile situation here as in war": *The Times* 7 October 1993, p 39.

administered, do not appear to guarantee against the infliction of gratuitous injury.[111] The point goes further than merely non-fatal injury to the person, because under the present[112] law it is murder to cause death by an attack intended to cause grievous bodily harm.[113] That is not merely a theoretical observation, since the British Medical Association reports that worldwide since 1945 361 deaths have occurred during boxing, most of them caused by a single or multiple concussive blow.[114]

10.21 The only explanation of injury and death continuing to be caused in boxing with complete impunity, at least as far as the criminal law is concerned, is that the immunity of boxing from the reach of the criminal law is now so firmly embedded in the law that only special legislation can change the position.[115] We do not consider further in this Paper whether such legislation should be introduced, for two reasons. First, as we have already pointed out, the legality of boxing is a clear anomaly in the context of the general rules applying to sports and games that are described above, or in the context of any general rules for sports and games that might emerge from the study conducted through this Paper. Second, we fully recognise that whether or not boxing should continue to be legal is a hotly contested issue, already much-debated, that is not going to be resolved by any sort of appeal to the general law.

10.22 Therefore, it is in our view for Parliament to take an entirely separate decision, in the light of the material sedulously put before it by the British Medical Association and others, as to whether boxing should continue to be lawful. We merely note that, in the event of boxing continuing to be lawful, and there being comprehensive legislation on offences against the person, it will be necessary specifically to provide in any such legislation that it is not criminal to kill or intentionally severely to injure another person in the course of a boxing bout.

[111] Reporting on the recent World heavyweight championship contest between Mr Lennox Lewis and Mr Frank Bruno, the chief sports correspondent of *The Times*, Mr Frank Miller, said that "the referee, although seeing Frank Bruno defenceless on the ropes with his mind blurred, permitted Lennox Lewis a second onslaught in which at least six more devastating and unnecessary blows rocked Bruno's head": *The Times* 4 October 1993, p 23.

[112] Proposals for a more limited law of murder law made in 1980 by the Criminal Law Revision Committee, and in 1989 by the House of Lords Select Committee on Murder, are not to be taken up by the government: see the observations of Earl Ferrers, *Hansard* (HL) 30 November 1989, vol 512, col 452.

[113] *Cunningham* [1982] AC 566.

[114] British Medical Association: *The Boxing Debate* (1993), at p 66. The most recent fatalities in the United Kingdom are of Mr Steve Watts, an experienced professional, who developed an acute subdural haematoma after a fight in 1986 and died despite neurological intervention; and Mr Joseph Sticklan, an amateur boxer who died in 1987 from a subdural haematoma after losing only his second fight.

[115] "I intend no disrespect to the valuable judgment of McInerney J in *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331 when I say that the heroic efforts of that learned judge to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible. It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.": Lord Mustill in *Brown* [1993] 2 WLR 556 at p 592F-G.

Other violent sports

10.23 It has been pointed out that some forms of martial arts recently introduced into this country, including Thai boxing, kick boxing, and full contact karate,[116] may be equally or more dangerous than (traditional) boxing.[117] Under the present law, and under the proposals made later in this Paper,[118] serious injuries deliberately inflicted during such contests would appear, in the absence of an express exemption such as is enjoyed by boxing,[119] to be plainly criminal. The legal status of these sports is thus at present controversial, and we would welcome further comment and information about these activities. At the moment we are minded to think that they, like boxing,[120] should be the subject of special consideration by Parliament.

Other situations in which consent may or may not be a defence

Casual fighting

11.1 *Attorney-General's Reference (No 6 of 1980)*, which we have already referred to at length, directly concerned a fight between two youths to settle an argument. There was an element of premeditation, common in such exchanges,[121] and plainly each participant in deciding to take part in the fight must have been aware of, and have consented to run, the risk of at least some actual bodily harm.

11.2 The Court of Appeal was clear that such consent could not found a defence, it would seem, to any criminal charge;[122] and thus that such casual fighting was not a special category that took the case out of the general law as to consent. As Lord Lane CJ put it:

> "[I]t is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is

[116] See *Medicine, Sport and the Law* (ed SDN Payne FRCS) at p 215: "In this sport blows of unmitigated force are directed against the target area of the opponent, ie the head and the trunk."

[117] See the remarks of Lords Addington and Meston in a recent House of Lords debate on boxing, *Hansard* 4 December 1991, vol 533, cols 294 and 309 .

[118] See paras 41.1ff below.

[119] See para 10.21 above.

[120] See para 10.22 above.

[121] "Before the fight the respondent removed his watch and handed it to a bystander for safe keeping and the youth removed his jacket": [1981] QB 715 at p 717F.

[122] In *Brown* Lord Mustill, at p 597B, drew attention to the fact that the formulation in *Attorney-General's Reference (No 6 of 1980)* excludes consent as a defence even where the accused is charged only with assault, and indicated that he would wish to reserve his position on that point. That formulation is, however, consistent with, and indeed the basis of, the statement of the general law adopted by the majority in *Brown*, that consent is not a defence to a charge of assault where the defendant's act is intended or likely to cause injury: see eg para 1.2 above.

an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent."[123]

11.3 Lord Lane's reference to "minor struggles" would seem to be limited to encounters in which there is no risk, or at least no significant risk, of actual bodily harm occurring: since, on the Court of Appeal's formulation, if actual bodily harm is caused the act will be an assault irrespective of consent. Accordingly, and always remembering that everything changes once the participants engage in the degree of formality that involves entering a boxing ring, consent as a defence in cases of fighting is limited to only the most innocuous of encounters, that in reality probably do not merit the description of "fight" at all.

Horseplay

11.4 The strict view taken of fighting has not been followed as rigorously in the case of behaviour that can be dignified by the categorisation of "horseplay" or, as it is sometimes called, "innocent horseplay".[124] However, as will be seen, one of the main difficulties of this part of the law is to identify what forms of behaviour count as such horseplay. That creates considerable difficulty in identifying the limits of, and justification for, this category of exemption.

11.5 The existence of a special category of cases, where consent to injury inflicted during horseplay is recognised as a defence, was explicitly confirmed by Swift J in *Donovan*:

> "Another exception to the general rule, or, rather, another branch of the same class of exceptions, is to be found in cases of rough and undisciplined sport or play, where there is no anger and no intention to cause bodily harm. An example of this kind may be found in *Bruce*[125]. In such cases the act is not itself unlawful, and it becomes unlawful only if the person affected by it is not a consenting party."[126]

11.6 In *Bruce*[127] a drunken man went into a shop, and as a joke seized a boy round the neck and began spinning him round until they got into the street. The boy broke away and the prisoner in consequence staggered into the road and fell against a woman who was passing. He knocked her down and she died shortly afterwards. It appeared that the boy

[123] [1981] QB 715 at p 719C-D.

[124] This category is not mentioned in Lord Lane's list of exceptions to the general rule that he set out in *Attorney-General's Reference (No 6 of 1980)*: see para 1.3 above. It does however undoubtedly have some special rules of its own and, as McCowan J suggested in *Jones* (1986) 83 Cr App R 375 at p 379, may well be one of the matters that Lord Lane had in mind when indicating that the list that he gave was not intended to be complete.

[125] (1847) 2 Cox CC 262.

[126] [1934] 2 KB 498 at pp 508-509.

[127] (1847) 2 Cox CC 262.

made no resistance to the prisoner's treatment of him, believing that it was merely done in play. The prisoner was charged with manslaughter. Erle J directed the jury that:

> "Where the death of one person is caused by the act of another, while the latter is in pursuit of any unlawful object, the person so killing is guilty of manslaughter, although he had no intention whatever of injuring him who was the victim of his conduct. Here, however, there was nothing unlawful in what the prisoner did to this lad, and which led to the death of the woman. Had his treatment of the boy been against the will of the latter, the prisoner would have been committing an assault-an unlawful act-which would have rendered him amenable to the law for any consequences resulting from it; but as every thing that was done was with the witness's consent, there was no assault, and consequently no illegality."[128]

11.7 While, as we have seen, this case has been used to suggest that cases of horseplay provide an exception to the general rule about consent, it should be noted that there was no evidence to suggest that the boy here suffered or was likely to suffer any actual injury. It appears, therefore, that his consent would in any event have provided a defence to the charge of common assault, under the general rule which allows consent to operate where actions are neither likely nor intended to cause injury. Later cases have, however, made it clear that consent to horseplay can be a defence to a criminal charge even when *serious* injury is caused. That goes beyond the formulation in *Donovan*, which referred to cases where there was no anger or intention to cause bodily harm.

11.8 The first full examination of horseplay came in *Jones*[129]. The appellants were convicted of inflicting grievous bodily harm. Two schoolboys, aged 14 and 15, were seriously injured after being tossed in the air by the appellants who were former schoolfellows of the victims. The appellants denied any intention to cause serious harm although they admitted foreseeing that bruising might result. They regarded it as a joke, shared by the victim. The judge ruled that foresight of some risk of physical harm, albeit minor, was sufficient for the section 20 charge. He declined to direct the jury that if they thought the appellants had only been engaging in rough and undisciplined play, not intending to cause harm and genuinely believing that the victims were consenting, they should acquit. The appellants changed their pleas to guilty , and appealed against conviction.

11.9 The Court of Appeal accepted three propositions formulated by the defence. The first is that "consent to rough and undisciplined play", where there is no intention to cause injury, must be a defence. If the proposition be taken at face value, it would appear that, even when there is known to be a risk of *serious* injury, consent negatives recklessness. It is apparently thought not to be unreasonable to take such a risk with a person who consents to it. The second and third propositions were that, (2) in the absence of consent in fact, genuine belief in consent is a defence; and (3) it is irrelevant whether a genuinely

[128] At p 263.

[129] (1986) 83 Cr App R 375.

held belief is reasonably held or not. In the view of Smith and Hogan[130], the decision in *Jones* recognises that boys have always indulged in rough and undisciplined play amongst themselves and probably always will. The non-consenting child is protected by the criminal law; unless the other rough and undisciplined players believe that he is consenting, even if in reality he is not.

11.10 The most recent case in which rough and undisciplined horseplay was allowed to form the basis of a defence to a charge of serious injury however concerned not children but grown men. In *Aitken*[131], the appellants had been convicted, at a general court-martial, of inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act 1861. Three officers in the Royal Air Force had poured white spirit on to a colleague, Gibson, and then set it alight, causing him severe burns. The incident occurred during an officers mess celebration. Earlier, as a part of the horseplay after the formal celebrations and in the presence of the three appellants and the victim, a mutual friend had set fire to two of their colleagues' fire resistant clothing while they slept. These two colleagues gave evidence that this was the sort of behaviour that happens amongst officers in the Royal Air Force. The appellants complained that the Judge Advocate had failed to give an adequate direction about the relevance of the victim's consent. Relying on *Jones*, the nature of the horseplay and pranks in which Gibson had been involved that evening were such that he must be taken to have given his consent to being involved in the sort of boisterous activities which had been taking place throughout the evening.

11.11 The prosecution argued that such directions were not necessary as the incident must have been unlawful. The escalating seriousness of the incidents took them, it was argued, outside the realm of "rough and undisciplined horseplay", and so the question of consent did not arise. The Courts-Martial Appeal Court did not agree, holding that the facts were not so plain as to absolve the Judge from the need to give a direction on consent, in the following terms:

> "It is common ground that there was no intention to cause any injury to Gibson. In those circumstances, if Gibson consented to take part in rough and undisciplined mess games involving the use of force to those involved, no assault is proved in respect of any defendant whose participation extended only to taking part in such an activity. If Gibson did not consent, the application of force to him in the course of rough and undisciplined mess games it is still not unlawful if a defendant held a genuine belief, whether reasonably held or not, that he *was* consenting. Only if you are sure that Gibson did not in fact consent, and sure that the defendant did not hold a genuine belief that he was consenting, would an assault be proved."[132]

[130] JC Smith and B Hogan *Criminal Law* (7th ed, 1992) at p 408.

[131] [1992] 1 WLR 1006.

[132] At p 1021B-D, *per* Cazalet J.

11.12 The defence of horseplay was, therefore, held to be potentially applicable to dangerous activities which created a clear risk of bodily harm. One of the crucial points about the judgment was the concentration on Gibson's consent to the *activities* in question, rather than to the specific act that caused the injury. It is hard to think that Gibson actually or impliedly consented to what actually happened to him, and this led the Court, by its reference to rough *games*, to draw an analogy with lawful sports by concentrating on the consent to join in the "game" as a whole.

11.13 There is, however, a crucial difference between the games that have been accepted under the "lawful sports" exception and casual conduct of the type that occurred in *Aitken*. As Lord Jauncey of Tulichettle pointed out in *Brown*,[133] in lawful sports there is the control of a referee: and, we would add, a referee who administers formalised rules, not depending on the passing whim of the immediate participants, which rules, as we have suggested, will in any respectable sport forbid dangerous or aggressive conduct.[134] It is that formalised structure, and the protection that it gives the participants from each other, that players consent to when they agree to join the game. They clearly do not consent to, and the law does not allow them to consent to, anything at all that may happen that the particular participants choose to regard as part of the game.

11.14 The approach in *Aitken* therefore distorts the law on sports and games in two ways. First, by concentrating on the subjective consent of the victim,[135] as the test of whether an exception should be made to the general rule of liability, the Court abandons the objective and controlling role that, we have suggested, both Canadian and English authority indicates that it should play in deciding the permitted limits of implied consent to risk of injury in sport.[136] Second, however, and paradoxically, by picking up the concept of consent to take part in the game, but in relation to a game that has no rules, no control and, it may be added, no agreed final whistle,[137] the Court was able to find that the victim had consented, in a legal sense, to what was done to him, when on any realistic view of his actual state of mind he had not done so. This in turn enabled the Court to find that a victim of what was horseplay but not fighting could consent to injuries infinitely more serious than those involved in *Attorney-General's Reference (No 6 of 1980)*.

11.15 It will be apparent that we regard the reasoning and outcome in *Aitken* with some reserve. It is particularly unfortunate (and surprising, in view of the case's apparent widening of

[133] [1993] 2 WLR 556 at p 567B.

[134] See para 10.11 above.

[135] Lord Mustill in *Brown*, [1993] 2 WLR 556 at p 594C, denies that the exception in the case of rough horseplay turns on the choice of the victim. His Lordship did not, however, have the opportunity of considering *Aitken*, since that case was not cited to the House in *Brown*.

[136] See para 10.9 above.

[137] Gibson was injured after leaving the bar in order to retire to bed, apparently having had enough of the fun and games of the evening: [1992] 1 WLR 1006 at p 1009F-G.

the permitted boundaries of victim consent) that the House of Lords in *Brown* was not invited to consider its implications. While what occurred in *Jones*[138] might, with some effort, be regarded as analogous to the "minor struggles" referred to in *Attorney-General's Reference (No 6 of 1980)*,[139] it seems impossible to reconcile the result in *Aitken* with the principal holding in that authoritative case. However, for the moment, it appears to be the law that if injury is caused in the course of what can be categorised as horseplay, in which the victim can be held to have joined, or at least been an unprotesting bystander,[140] then his "consent" will be a defence even to a charge of recklessly inflicting *serious* injury.[141]

Dangerous exhibitions

11.16 Although "dangerous exhibitions" was one of the special categories mentioned by Lord Lane in *Attorney-General's Reference (No 6 of 1980)*,[142] there are no decided English cases that have turned on the existence of this exception. The circumstances envisaged however include the victim offering himself as the human target in a knife-throwing display, where in the absence of extreme skill on the part of the performer, there is a risk of not merely serious injury, but death.[143] The only substantial discussion of the question[144] suggests that the criminal law should simply not enter this area; otherwise the courts would be faced with the invidious task of deciding between the risks that people may and may not legitimately run in respect of their own bodies. That should be accepted not only for open air sports but for cinema "stuntmen" and circus entertainers: risks are taken every day in these performances, and sometimes accidents happen, but the police rightly take no notice.

11.17 The cases already discussed show, however, that there is no general rule that a person can run what risk he likes with his own body; and a more restricted view than that just suggested was indeed taken in the only judicial discussion of dangerous exhibitions, in the New Zealand case of *McLeod*[145]. The defendant was an expert marksman who, in the course of a performance of his skill, invited a member of the audience to hold a

[138] Paras 11.8-11.9 above.

[139] See para 11.3 above.

[140] That seems to have been the limit of Gibson's involvement in the earlier incidents: see [1992] 1 WLR 1006 at pp 1008-1009.

[141] By permitting "consent" even to serious injury the horseplay cases seem to go beyond the normal limitation on acceptable consent, as suggested eg by Lord Slynn of Hadley in *Brown*, cited in n 186 to para 17.4 below.

[142] See para 1.3 above.

[143] See *McLeod*, cited in para 11.17 below. A decision of a single member of the Criminal Injuries Compensation Board on the reverse situation, where a professional escapologist was injured when extricating himself from ropes too effectively tied by members of the audience, concluded that he had been the author of his own misfortune: 25th Report, Accounts for the year ended 31 March 1989 (Cm 900), para 16.9.

[144] Glanville Williams *Textbook of Criminal Law*, (2nd ed, 1983) at pp 592-593.

[145] (1915) 34 NZLR 430 (CA).

cigarette in his mouth which was to act as a target. The invitation was accepted, and the defendant aimed at the cigarette ash with the object of knocking it away. No injury would have occurred but for the fact that the volunteer moved his head just before the defendant fired, which caused the bullet to enter his cheek. The defendant was charged with a number of offences; assault occasioning actual bodily harm, common assault and an offence under section 206 of the New Zealand Criminal Code of causing actual bodily harm under such circumstances that if death had ensued the prisoner would have been guilty of manslaughter[146].

11.18 The New Zealand Court of Appeal considered first the third, and most serious, charge of assault in circumstances that would have amounted to manslaughter. Since no person can consent to another killing him,

> "It therefore appears to us clear that if, as in this case, bodily harm was caused to [the victim] under such circumstances that if death had ensued McLeod would have been guilty of manslaughter, that the prisoner comes exactly within section 206 of our Criminal Code. It is unnecessary, in our opinion, therefore, to consider whether the accused could have been found guilty of assault occasioning bodily harm or common assault... ."[147]

Therefore, since consent to being killed is ineffective, the section 206 offence must be established. The Court however went on to discuss the general common law on consent, noting that there appeared to be a limited exception, based on lawful sport, to the general rules on consent, provided the acts consented to do not involve dangerous weapons. But in the instant case:

> "although the sport - if it can be termed sport - was indulged in with the consent of [the victim], still a lethal weapon was used and in risky circumstances, and in our opinion if [the victim's] death had ensued, McLeod would have been guilty of manslaughter. That being so, the verdict of 'Guilty' should, in our opinion, be entered on the third count of the indictment."[148]

11.19 The effect of this decision is obscured by the law of manslaughter that underlay it. The charge of manslaughter would have had to be based on killing during an unlawful act. Since "a lethal weapon was used and in risky circumstances", the Court regarded the act as unlawful even if done with consent.[149]

[146] The Crimes Act 1908 s 206: "Every one is liable to two years imprisonment with hard labour who causes actual bodily harm to any persons under such circumstances that if death had been caused he would have been guilty of manslaughter."

[147] (1915) 34 NZLR 430 at pp 433-434.

[148] At p 434.

[149] Sir Francis Boyd Adams *Criminal Law and Practice in New Zealand* (2nd ed, 1971) at p 173.

11.20 The law as to "dangerous exhibitions" therefore remains uncertain. As we shall suggest when discussing the future policy of the law, the implications of the case may be different where a person takes a risk of injury from some activity engaged in by himself, as opposed to where he runs the risk of another injuring him.[150] The analogy with cinema stunt men and similar entertainers[151] may not therefore be exact. Moreover, the social value of persons exposing themselves to the risk of death or serious injury at the hands of a third party in the name of exhibition or entertainment is perhaps less obvious now than it was in an era more sympathetic to the values of the circus or music hall. In the perhaps unlikely event of the question being litigated, the English courts might be attracted to the broad principle of *McLeod*,[152] that a context of entertainment does not permit the taking of a risk of serious injury.

Other cases

11.21 Lord Lane CJ's list in *Attorney-General's Reference (No 6 of 1980)* was not intended to be exhaustive;[153] and in *Brown* cases other than those already discussed were suggested:

Lord Templeman:[154]

> "Ritual circumcision, tattooing, [and] ear-piercing ... are lawful activities."

Lord Mustill:[155]

> "For the sake of completeness I should mention that the list of situations in which one person may agree to the infliction, or to the risk of infliction of harm, by another includes dangerous pastimes, bravado (as where a boastful man challenges another to try to hurt him with a blow) and religious mortification."

Lord Slynn:[156]

> "The law has recognised cases where consent, expressed or implied, can be a defence to what would otherwise be an assault... [including] surgical operations, sports, the chastisement of children, jostling in a crowd, but all subject to a reasonable degree of force being used, tattooing and earpiercing."

[150] See paras 12.1-12.4 below.

[151] See para 11.16 above.

[152] (1915) 34 NZLR 430.

[153] See n 124 to para 11.4 above.

[154] [1993] 2 WLR 556 at p 560F. As to circumcision see n 246 to para 37.2 below.

[155] At p 594A.

[156] At p 603F-G.

The existence of a special category of cases based on religious mortification has also been recognised, obiter, in a Scottish case:

> "In some circumstances, a beating may be consented to, as in the case of rheumatism, or in a case of a father confessor ordering flagellation; but this is not violence or assault, because there is consent."[157]

11.22 No further indication is given, in *Brown* or elsewhere, of the basis for these assertions, and in some cases, such as ear-piercing and perhaps tattooing, one is driven to think that they are assumed to be lawful only because no-one would ever be minded to suggest otherwise. Certainly, ear-piercing would seem to be a form of actual bodily harm, that is in the nature of a medical operation, but which does not enjoy the exemption for lawful medical treatment because it is neither done for medical purposes nor performed by a medical practitioner.[158] Somewhat similarly, flagellation, if still a live issue in practical terms, differs only from the conduct excoriated in *Donovan*[159] by reason of the motives of the participants.

11.23 The difficulties just mentioned have not emerged, and are unlikely to emerge, in any contested case. They do, however, show the difficulty or impossibility of formulating any general or consistent explanation of the various cases that have been found or assumed to lie outside the general rule as to consent. That was strongly the theme of Lord Mustill's speech in *Brown*, with which theme we respectfully agree. The inconsistent state of the special cases, and the need in a fair number of instances to assume that for social or practical reasons the general rule enunciated in *Attorney-General's Reference (No 6 of 1980)* and in *Brown*[160] does not apply, is a strong reason for reconsidering whether the line of exclusion of consent as a general defence was drawn by those cases in the right place. That reconsideration is offered in the next section of this Paper.

"Trivial touchings"

11.24 We mention this case only for completeness. In his seminal judgment in *Collins v Wilcock*[161] Robert Goff LJ referred to the trivial physical contacts that are an inescapable part of ordinary life, and explained their exemption from the law of battery not as an example of a defence of consent, but as one of the limits on the ambit of that offence:

[157] *Wm Fraser* (1847) Ark 280 at p 302, *per* Lord Mackenzie.

[158] It will also be recalled that one of the reasons given in *Brown* for not legitimising the piercing of other parts of the male anatomy was the danger of infection: see Lord Templemen, [1993] 2 WLR 556 at p 565B-C. That is a danger that cannot be excluded in ear-piercing and tattooing.

[159] [1934] 2 KB 498.

[160] See para 4.2 above.

[161] [1984] 1 WLR 1172.

"Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact. So nobody can complain of the jostling which is inevitable from his presence in, for example, a supermarket, an underground station or a busy street; nor can a person who attends a party complain if his hand is seized in friendship, or even if his back is, within reason, slapped... . Although such cases are regarded as examples of implied consent, it is more common nowadays to treat them as falling within a general exception embracing all physical contact which is generally acceptable in the ordinary conduct of daily life."[162]

11.25 We felt sufficiently persuaded of the correctness of that analysis, after submitting the point to consultation, that we have adopted it in clause 6(2) of the Criminal Law Bill included in Law Com No 218, which reads:

"No such offence is committed if the force or impact, not being intended or likely to cause injury, is in the circumstances such as is generally acceptable in the ordinary conduct of daily life and the defendant does not know or believe that it is in fact unacceptable to the other person."[163]

This case will therefore not be discussed further in this Paper. In any event, of its nature it does not illuminate the approach that the law should take to consent to more serious injury.

[162] At p 1177E-G.

[163] For further discussion see Law Com No 218, paras 20.1-20.7.

PART III

OPTIONS FOR REFORM

INTRODUCTION

12.1 The cases discussed in Part II, although lacking any very clear general theme, do indicate a deep-seated belief that there must be limits placed by the criminal law on the extent to which one person can agree, expressly or impliedly, to be injured by another. That is perhaps most clearly seen in respect of the causing of death: suicide or attempted suicide is no longer a crime,[164] but very firmly entrenched prohibitions prevent a person from consenting to be killed by another. The same distinction is, however, made in respect of non-fatal injuries.

12.2 The rationale for the distinction has not been much explored, but it is interestingly set out by Professor Fletcher. He observes that personal autonomy, in the sense of the right of person to do what he likes with himself, is a very strong value; but that the basis of that right is undermined when another party is involved in the injury:

> "If the issue were paternalism, the government should employ sanctions as well against suicide and other forms of self-destruction. [But]... the distinction between self-injury and consenting to injury by others derives from the danger of implicating other persons in dangerous forms of conduct. The individual who kills or mutilates himself might affect the well-being of family and friends, but this result depends on the actor's relationships with other people. In contrast, the self-destructive individual who induces another person to kill or mutilate him implicates the latter in the violation of a significant social taboo. The person carrying out the killing or the mutilation crosses the threshold into a realm of conduct that, the second time, might be more easily carried out. And the second time, it might not be particularly significant whether the victim consents or not."[165]

12.3 Somewhat similar considerations were urged by Lord Templeman in *Brown*:

> "Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies.

[164] Suicide Act 1961, s 1.

[165] GP Fletcher, *Rethinking Criminal Law* (1978), at p 770.

They inflicted bodily harm on willing victims. Suicide is no longer an offence but a person who assists another to commit suicide is guilty of murder or manslaughter."[166]

12.4 Any law that addresses the consent of the victim in cases where one person inflicts injury on another has in our view to recognise considerations of the order just mentioned. It is not enough to rely simply on the right of *self*-determination of the victim to do what he likes with his own body. If, however, there are readers who would wish to argue against that position, we think it important that they should indicate what limits, if any, should be placed on the criminal immunity of A for inflicting injuries on B with B's consent; and the attitude that the law should take to the social damage, and damage to A, of such conduct.

12.5 That fundamental issue apart, we think it necessary, as we have already indicated, to distinguish between cases where the victim's consent is the direct and sole issue; and other cases where special rules may have to be created for particular activities, where the victim's agreement to participate may well play a significant role, but is not determinative of liability for any injury suffered by him. That distinction is already reflected in the present law, in the general and the special rules explained in Part II above. We therefore proceed as follows. We first consider whether there should be any, and if so what, rule that provides exemption from criminal liability for injury based solely on the consent of the victim, and without specific reference to the particular circumstances or activity in which the injury is inflicted. We then, as part of that enquiry, consider whether there should be rules as to what counts as effective consent, or rules about which classes of people, and in what circumstances, may give consent to be injured. We then consider, within the options for general consent already discussed, whether there should be particular rules for any particular types of activity.

THE GENERAL EFFECT OF CONSENT

The question

13.1 There is no doubt that in the present law effective consent can be given to *some* general level of physical interference. Commonsense, and the need to prevent the criminal law making life in society impossible, indicate that such a rule should continue. The present rule is that confirmed in *Brown*, that consent provides no defence to any act that is intended or likely to cause actual bodily harm or, in the more modern language adopted in the Criminal Law Bill in Law Com No 218, that is intended or likely to cause injury.

13.2 The main question on which we seek comment is whether that should continue to be the limit on effective consent, or whether the line should be drawn at some other place on the spectrum of interference with or injury to other people. What follows are considerations that commentators may wish to have in mind when addressing that question.

[166] [1993] 2 WLR 556 at p 564A-C.

The effect of the present rule

14.1 "Actual bodily harm" connotes a fairly low level of interference with another person.[167] Under the Criminal Law Bill, a similarly broad approach is taken to "injury", the concept including anything that can be legitimately be described as an injury, as opposed to the mere application of force to or causing of an impact on another, and without excluding from the definition injuries that might be thought trivial or inconsequential. There are good reasons of policy for this general approach, which were accepted by those whom we consulted before finalising the Criminal Law Bill included in Law Com No 218. This approach does however mean that, both in the present law, and in the law under the Criminal Law Bill, the general rule of consent has a very limited ambit.

14.2 Thus, for instance, tattooing or ear-piercing, activities that, if carried through with the consent of the victim, no criminal law system would sensibly wish to punish, are not covered by the general rule, but have to be the subject of an assumed, but undoubtedly obscure, special rule.[168] More controversially, even very modest acts of beating of one adult by another, with the consent and indeed the active encouragement and pleasure of the person beaten, are only permissible if they can be brought under the equally obscure special case of religious mortification.[169] Any such act that does not enjoy that special exception (whether, as in *Brown*, the congress between the two parties takes place for sexual motives, or for no discernible motive at all) will necessarily be criminal.

14.3 The first issue, therefore, is whether so limited a role for consent is necessary or desirable.

The interests of society

15.1 As we suggested in paragraphs 12.1-12.4 above, society has a direct interest in limiting the extent to which persons should be allowed to injure others, even with the others' consent. It is therefore necessary to take into account any possible effect of a rule permitting injury with consent both on the general perception of the need to control violence and on the attitudes of those inflicting violence with impunity from the criminal law.

15.2 Those considerations do not however necessarily dictate the drawing of the line at where it is now placed. Consensual injury above the present modest level does appear to be permitted in a fairly wide range of situations without obvious damage either to those inflicting the injuries, or to society's attitude to non-consensual violence. While we have stressed that the consent of the victim does not absolve the law from further judgement, at the same time the fact that the victim has consented to the act can make a great difference to its implications, both in moral and in social order terms. One might

[167] "Any hurt or injury calculated to interfere with the health or comfort of the prosecutor": *Miller* [1954] 2 QB 282 at p 292.

[168] See para 11.21 above.

[169] *Ibid.*

compare, for instance, A being roughly pushed by B because he has made some remark to which B objects; and B piercing A's ears, or some other part of A's anatomy, at A's invitation. There is no dispute that the former, minor, physical interference with another is properly a crime, albeit not a serious one. The criminal status of the latter consensual, but physically much more serious, act is by contrast hotly disputed.

15.3 The implications of the present law were, indeed, clearly seen in *Brown*: that because the line as to permitted general consent is drawn at so modest a degree of interference with others, consensual acts above that line that do not fall within one of the assumed categories of exemption will be outlawed unless they can be positively shown to have social merit. It is difficult to demonstrate that fact, or supposition, within the confines of a particular case.[170] But, more fundamentally, the general rule of minimal interference by the criminal law means that, outside the particular jurisprudence of consent, many forms of conduct that have no particular use or merit are allowed to continue unchecked, and certainly unchecked by the criminal law. The application of that general judgement to the activities discussed in this Paper may, however, be distorted by the fact that they involve the very low level of consensual interference with others that the criminal law prohibits unless the activity falls into a recognised special case.[171]

15.4 A further interest of society, considerably stressed in *Brown*,[172] is the need to protect the "consenting" victim, by ensuring that his will is not overborne, and that he does know what he is consenting to. That is a significant issue, to which we devote attention later in this Paper. But we do not see how that affects the *degree* of injury to which consent can, as a general rule, be permitted. The answer to the problem, insofar as a watertight answer can be given in any system in which "consent" is permitted for any purpose, is to have clear rules that cover the cases where the victim needs protection. It would not in our view be a legitimate response to conclude that that objective of protection of the ostensibly consenting victim cannot be achieved, or cannot be achieved with sufficient certainty, and therefore that it is only safe to allow only very modest interference in *any* case, even including cases where the victim is plainly not only consenting but anxious that the interference should take place.

15.5 In our view, therefore, it is open to consultees, and to ourselves, to consider whether the limit of permitted consent should be drawn at a different place from the present. The remainder of this section is largely devoted to exploring, for critical comment, the limits and implications of such a change in the law.

[170] See the observations of Lord Mustill, cited in n 40 to para 6.4 above.

[171] Some may see considerable force in the opening words of Lord Mustill's speech in *Brown* [1993] 2 WLR 556 at p 584C: "My Lords, this is a case about the criminal law of violence. In my opinion it should be a case about the criminal law of private sexual relations, if about anything at all".

[172] See for instance Lord Templeman, [1993] 2 WLR 556 at pp 564F-565B.

Consent permitted to any non-serious injury?

Introduction

16.1 In the Criminal Law Bill in Law Com No 218 we make a distinction between injury and serious injury, relying however on the judgement of the jury, rather than on any mechanism of legal definition, to identify what shall count as serious injury. In accordance with the view that there should be *some* limit on consensual injury,[173] we assume that consent should not be permitted to such serious injury: since, if it were, that would be tantamount to permitting consent to any injury at all. That therefore leaves the question of whether consent should be permitted in all cases of injury, though not of serious injury.[174]

16.2 As all of their Lordships recognised in differing degrees in *Brown*,[175] that question is essentially one of policy. We can however point to a number of considerations that have to be borne in mind in making the decision.

Difficulty of drawing the line

17.1 In *Brown* both Lord Jauncey of Tullichettle[176] and Lord Lowry[177] pointed to the difficulty of drawing a line between different acts prosecuted under the present law of offences against the person. Their observations, however, were directed at the basic argument of the appellants in that case which (to put it shortly)[178] was that consent should be a potentially valid defence to any charge under section 20 of the Offences against the Person Act 1861. That section, however, extends to the infliction of *serious* [i.e., in the actual wording of the statute, "grievous"] bodily harm.[179] The argument that the line should be drawn at conduct causing *actual*, not serious, bodily harm therefore meant in terms of the Offences against the Person Act 1861, that

> "the line is drawn, as my noble and learned friend, Lord Jauncey of Tulichettle puts it, ante, p 567H, 'somewhere down the middle of section 20', which I would regard as a most unlikely solution."[180]

[173] See para 12.4 above.

[174] That rule was thought by Lord Slynn of Hadley in *Brown* to represent the present law: see [1993] 2 WLR 556 at pp 606C-608D, and paras 7.9-7.11 above.

[175] See para 8.1 above.

[176] At p 573C-E.

[177] At p 577G.

[178] For a detailed account, see the speech of Lord Jauncey of Tullichettle, at pp 567C-568A.

[179] See the "translation" of ss 18, 20 and 47 of the Offences against the Person Act 1861, in the light of judicial interpretation, that is given at para 12.15 of Law Com No 218. It is one of the most telling criticisms of the present structure of the law of offences against the person, and a prime reason why there is very strong pressure for the reform of that law, that sections of the statute deal indiscriminately with a wide range of injuries of very differing degrees of seriousness.

[180] [1993] 2 WLR 556 at p 577G-H, *per* Lord Lowry.

17.2 The appellants' argument was, however, that in drawing the line the structure of the 1861 Act should be disregarded;[181] and that view was adopted by Lord Slynn of Hadley, who accepted that a line could be drawn, and that it should be drawn at the doing of grievous bodily harm.[182] In truth, the difficulties of Lord Lowry and Lord Jauncey of Tullichettle were directed more at trying to explicate the current law by reference to whatever hints might be picked up from the structure of the 1861 Act,[183] than at the feasibility of distinguishing between serious and other injury. We venture to suggest that with the introduction of the new structure of offences recommended in Law Com No 218, which creates separate and distinct offences dealing with serious injury on the one hand, and non-serious injury on the other,[184] there will be no reason to think that a distinction, in relation to the victim's consent, between injury and serious injury is inconsistent with the general structure of the law.

17.3 It is true that, in deciding whether what the victim consented to falls within a defence based on consent to non-serious injury, a judgement will have to be made as to whether the consented-to injury counts as "serious". But that is the same judgement that has to be made as to whether the injury intended or inflicted is "serious", for the purpose of deciding whether the injurer should be charged with or is guilty of an offence of serious injury, or only of an offence of injury. That question cannot be avoided, and cannot be decided by rigid rules, wherever the line is drawn.

17.4 That an element of judgement is involved will admittedly not give a potential injurer a conclusive answer in every case as to whether he should act on a particular consent of the victim. We do not however see that as a significant objection. The type of case with which we are concerned will necessarily only arise where there is time for reflection on the part of the potential defendant, if only to consider the victim's attitude, and if the injurer is in any doubt as to the seriousness of what he is undertaking or being invited to undertake he will do well to err on the side of caution and not join in. That caution in its turn will not have a socially undesirable effect. We are concerned here not with activities of clear social need, such as medical treatment, where it is of importance that initiative should not be unduly constrained, but with activities the positive social benefit of which is difficult to demonstrate.[185] In such cases some difficulties of judgement for the injurer are inevitable. But we would suggest that such difficulties are not best eased by the present rule, that makes all injury of any kind, even if inflicted with the consent of the victim, necessarily criminal.[186]

[181] See [1993] 2 WLR at p 567G.

[182] Ibid, at p 606E.

[183] See in particular para 7.3 above.

[184] See para 1.7 above.

[185] See para 15.3 above.

[186] A similar problem indeed arises in connexion with at least some of the present special categories, such as tattooing, flagellation and the like. It would not seem that the general exemption for those activities extends to the consensual infliction of anything that could

Consent to injury or consent to risk of injury?

18.1 Stress was laid in *Brown* on the danger that the activities formally consented to might, as it were, get out of hand, with more extreme injuries being unpredictably inflicted on the "consenting" parties.[187] That underlines the principle that a rule of permitted consent must address not only what in fact occurs, but also what may occur: as indeed must the victim when giving the consent in the first place.

18.2 We are minded to think that it would be too restrictive to exclude from the permitted cases of consent any case where there was (any) risk of serious injury. Even in the most modest act of ear-piercing or minor beating there must be *some* danger of complication or infection that might result in serious injury. To make the test the presence of such risk would be to evacuate any rule based on reference to serious injury of much of its content. We would however suggest that a more practicable rule would be in terms of whether serious injury was *likely* in the given situation. That uses the same concept as the present rule, which however relates to a rule excluding from permitted consent any act likely to result in injury rather than serious injury.[188] The level of injury is a matter of policy; the formulation used in the current law indicates however that, within whatever policy is suggested, the concept of likelihood is coherent and manageable.

18.3 We suggest, therefore, that if injury is to be adopted as the criterion of what may be consented to, the test should be that the victim can consent to any act likely to cause such injury, but no more. That would exclude any act likely to cause serious injury. It also follows that it should not be possible to consent to any act that is intended by its doer to cause serious injury.[189] It should also be the case that the victim can exclude from his consent to *likely* injury the *intentional* infliction of that or any injury by the defendant.

The nature of the charge and the nature of the consent

19.1 We have so far spoken rather loosely about consent to (non-serious) injury providing a defence. As such, consent would be subject to the normal general rules affecting defences, including the rule that the burden of proof in respect of the defence rests on the prosecution. It is necessary, however, to investigate in some more detail how such a defence would operate. We set out the various separate considerations in the following sub-paragraphs.

reasonably be characterised as serious harm. Thus Lord Slynn of Hadley, [1993] 2 WLR 556 at p 603G, cited in para 11.21 above: "all subject to a reasonable degree of force being used". The religious superior or the ear-piercer, therefore, already has to exercise, at his peril, the judgement referred to in the text. That is rightly not regarded as any reason for abolishing those categories of exemption.

[187] See Lord Templeman [1993] 2 WLR 556 at pp 564G-565A and, drawing different conclusions, Lord Mustill at pp 600G-601C.

[188] See para 1.2 above.

[189] The effect of the perceptions of the injurer and the victim of each others' intentions or awareness of risk is dealt with below.

19.2 If the accused is charged with causing serious injury[190] no question of consent as a defence can arise,[191] because the accused has done something consent to which on the part of the victim is not permitted.

19.3 If the accused is charged with an offence of injury,[192] or of assault,[193] consent to the risk (in terms of likelihood[194]) of such injury or assault will be a defence. A more difficult question arises in theory, though perhaps less likely in practice, where the victim has in fact consented to the likelihood of *serious* injury. Three points can be made.

19.4 First, it may be thought that the importance of discouraging persons from consenting to be seriously injured is such that any act of consent to serious injury should simply render the activity ineligible for any exclusion from criminal liability. Second, and by contrast, since the greater includes the less, and the victim has therefore consented to what was in fact done to him, it would be unfair to the accused to make him liable for those (non-serious) injuries. Otherwise, he seems to be made liable because the victim's consent would not have been effective in respect of injuries that the defendant did not cause.

19.5 We seek opinion on this point. We are, however, inclined to the second of these views, that the victim's consent to serious injury should be an effective defence to a charge of causing (merely) injury.

19.6 We also invite comment on one additional issue. If the defendant *knows* that the victim is consenting to the likelihood of serious injury, it is arguable that he should not go on with the activity to which the victim has consented. The reason for such a rule would be the desirability of preventing the actual infliction of serious injury. If consent to (or encouragement of) such injury is deterred, then that infliction of serious injury will be rendered less likely. One means of deterrence is to act through the potential injurer, by making him reluctant to co-operate with a person who consents to serious injury. That is the same sort of policy reason that causes us to suggest that the defendant should not be able to rely on the victim's consent in any case where he *intends* to cause serious injury.[195]

The effect of the defendant's belief

20.1 In the type of case with which we are concerned, it seems unlikely that misunderstandings will arise as to whether or not the victim has consented to be injured. Beatings for

[190] That is, under clauses 2 and 3 of the Criminal Law Bill presented in Law Com No 218.

[191] Subject to the issue of a mistaken belief on the part of the accused, discussed in paras 20.1-20.2 below.

[192] Under clause 4 of the Criminal Law Bill.

[193] *Ibid*, clause 6.

[194] See para 18.2 above.

[195] See para 18.3 above.

religious or sexual purposes, the inflicting of minor injuries, circumcision, or minor purportedly medical procedures carried out by unqualified persons, are likely to have been preceded by exchanges between the parties as to what is to happen; and to be performed with some formality. At neither stage is the possibility for honest mistake likely to be large. Courts are likely to look with considerable scepticism at claims that, for instance, one party to a sexual encounter of that nature thought that the other was consenting to injury, when in fact the victim was not consenting.

20.2 Nevertheless, if such a case should arise, we are minded to think that, following the normal rule of the criminal law in relation to defences,[196] a person who believes that the other party is giving what would be a relevant consent should have the benefit of the present defence. We have already suggested that that should be the rule where the defendant thinks that consent is being given to injury only, but in fact the victim is consenting to serious injury.[197] We suggest that there are no overriding reasons for departing from a similar approach, that involves judging the defendant on the facts as he believed them to be, should he think that the victim is consenting when in truth he or she is not doing so at all.

Public or private

21.1 We have already ventured to suggest[198] that such attention as was paid in *Brown* to the fact that the acts in question took place in private was misconceived. The issue is the extent to which persons should be permitted to inflict harm or injury on each other. That issue is the same wherever the acts in question take place: just as the general law of assault and injury, as opposed to the law of public order or the law of indecency, does not vary according to the place where the acts complained of occur.

21.2 We therefore do not pursue any possibility that the law on consent should vary according to whether the injuries were inflicted in private. We think that this point only achieved some prominence in *Brown* because of the argument adduced by the appellants that special protection ought to be afforded to *sexual* violence committed in private. That of course is a different point. That it has to be raised at all as a matter of exception involves accepting that the *general* law of injury and consent is not affected by the private or public nature of the acts.

Summary

22.1 We have already indicated[199] that the decision to make any departure from the present general rule is essentially a question of policy, on which readers are likely to have strong

[196] This rule is explained at some length in relation to the present defence of self-defence, and to the defence introduced by the Criminal Law Bill of justified use of force, in paras 36.6-36.8 of Law Com No 218.

[197] That is the effect of the rules proposed in paras 19.4-19.6 above.

[198] See n 35 to para 6.2 above.

[199] See paras 13.1-13.2 above.

views of their own. If, however, some change from the present law were contemplated we provisionally propose, for critical comment, a rule that would provide that:

1. The defence of consent would extend to consent to the likelihood (see paragraph 18.2) of injury, but not to the likelihood of serious injury. This fundamental change is explained in paragraphs 16-17 above.

2. Because it excludes consent to serious injury, the defence of consent would be potentially available in respect of charges of assault and inflicting injury, but necessarily not in charges of inflicting serious injury (paragraph 19.2 above).

3. The defence would equally not be available where the defendant intended to cause serious injury, whatever offence he was actually charged with (paragraph 18.3 above).

4. Although the defence discourages consent to serious injury, it would be available even if the victim had consented to serious injury if the defendant only inflicted injury (paragraphs 19.4-19.5 above). We suggest, however, that in any case where the defendant *knows* that the victim is consenting to serious injury he should not be able to rely on the defence of consent (paragraph 19.6 above).

5. The defence would be subject to the normal rule that the defendant's liability should be judged on the facts as he believed them to be. The defendant would therefore have the benefit of the defence where he believed the victim to be consenting, even if in fact he was not (paragraph 20.2 above).

6. The law should be the same whether the acts complained of take place in public or in private (paragraphs 21.1-21.2 above).

The effect on the special cases

23.1 If the general rule remains as at present, the special cases of exemption will continue to be of particular importance.

23.2 First, they will be necessary to deal with cases of actual consent to injury that would under the present general rule involve criminal liability on the part of the injurer unless a special exemption were made. Several of these, such as ear-piercing or tattooing, are cases in which it is felt quite unreasonable that criminal liability should arise.[200] We discuss in paragraphs 35ff below how such cases should be handled in future; whether they can be rationalised in any way; and whether and on what basis there should be any addition to the present, somewhat uncertain, list of categories.

23.3 Second, it will still be necessary to give special attention to those cases, of which lawful sports is the most obvious, in which the victim's position is more naturally viewed, not

[200] See para 14.2 above.

in terms of consent to injury or the risk of injury inflicted by another party; but in terms of participation in an activity in the course of which injury may be inflicted by any of the participants, and thus potentially both by and on the "victim".

23.4 If a general defence were adopted in the terms suggested in paragraph 22.1 above, the position changes somewhat.

23.5 First, it is assumed that consent to *serious* injury is outlawed in any event.[201] The existence of one of the special categories cannot therefore extend the defence beyond the new general rule. That being so, most of the special categories will be absorbed into the general rule; and the question of whether a defence exists in an unfamiliar situation will involve simply the application of the general rule, rather than speculation, as in *Brown*, as to whether the situation deserves or requires the creation of a special exception.[202]

23.6 Second, however, it will be necessary to continue to give attention to cases such as those referred to in paragraph 23.3 above, precisely because they raise the issue of consent less directly than does the general rule, and therefore may not certainly be covered by, or may require more specific treatment than is provided by, the general rule. We therefore return to those issues in paragraphs 41.1-47.1 below.

Reality of "consent"

Introduction

24.1 Questions of the meaning of "consent"; of whether what appears to be consent is really consent at all; and of whether certain acts of consent should have legal effect; have caused considerable difficulty in the law of sexual offences. Attempts to produce verbal formulae that accurately express the law have, in the case of the offence of rape, resulted in nothing more helpful than to say that "consent" must be given its ordinary meaning, but that it differs from "submission".[203]

24.2 This unsatisfactory position persists in spite of the fact that the question of reality of consent is of particular importance in the case of rape because, for instance, the identity of the person with whom the woman is having intercourse; the reasons for which she agrees to that intercourse; and indeed, in extreme cases, the nature of the act itself; may be crucial to her agreement to enter into this most personal of activities. It is no doubt for that reason also that, in mitigation of some of the difficulties caused by arguments about "consent", specific offences have been created that prohibit the procuring of a woman, "consenting" or no, to have intercourse by threats, intimidation, false pretences or false representations.[204]

[201] See n 186 to para 17.4 above.

[202] Cf para 14.2 above.

[203] *Olugboja* (1981) 73 Cr App R 344 at p 350.

[204] Sexual Offences Act 1956, ss 2 and 3.

24.3 We do not pursue these issues in this, somewhat different, context. In particular we do not seek to follow the law of rape in producing a single formula to cover the many diverse cases with which we are here concerned. Rather, we review specific problems that might arise in connexion with the regime provisionally proposed above, and make suggestions, again for critical comment, as to how they should be handled.

The basic rule: "consent" bears its normal meaning

25.1 The question of whether a person has consented to a particular act or, as in the present case, to a risk of a particular injury or type of injury, is basically a question of fact. That question, however, cannot be answered in a vacuum, but has to be expressed in terms of whether the victim consented to the relevant act or risk.

25.2 We submit that the answer to that question should be treated simply as the first matter to be established in any case where the validity of the victim's "consent" is disputed. If it is not possible to say that the victim consented to the relevant act or risk, then the defence necessarily fails. That, however, is all that the answer to the question establishes. Further questions may therefore then arise as to whether the consent is vitiated by fraud, mistake, or other factors.

25.3 The present law, however, so far as it is possible to state it with any certainty, has not developed in that way. It is suggested, rather, by analogy with what is thought to be the rule in rape, that consent is vitiated if there is a mistake as to the identity of the person concerned or as to the nature of the act.[205] That rule, however, is treated as if it were not merely the first question to be asked, but the only question: so that, even in a case of fraud, that fraud will not vitiate the victim's consent unless it induces a mistake either as to the identity of the actor or as to the nature of his act.[206]

25.4 Whatever may be the requirements of authority, we do not think that that approach is helpful. It involves complicated and indeed metaphysical discussion in cases where there ought to be a simpler answer; and very arguably allows "consent" to exculpate an assaulter in circumstances where he is morally culpable. That was demonstrated in the Canadian case of *Bolduc and Bird,*[207] where D, a doctor, obtained the (female) victim's consent to a vaginal examination at which D2 was present by falsely pretending that D2 was a medical student. The Supreme Court of Canada held that D's fraud concerned only the status of D2, and thus did not go to the "nature and quality" of what had been done. We would suggest that that case alone is reason for a critical review of the present law.

[205] JC Smith & B Hogan, *Criminal Law* (7th ed, 1992), at p 406.

[206] Smith & Hogan, *op cit*, at p 457. The only clear statement in the cases to this effect is the admittedly great authority of Stephen J in *Clarence* (1888) 22 QBD 23 at p 43, who held that this was the rule as much in assault as in rape. None of the other judges in *Clarence* appear, however, to have taken the point, the case having been resolved on other and more technical grounds: see Law Com No 218, at n 199 to para 15.16.

[207] (1967) 63 DLR (2d) 82.

What many may feel is an unwelcome licence to fraudulent persons can only be avoided by reasoning of the most artificial nature as to the "nature" of an act.[208]

25.5 We leave open for comment the question of whether the current English law, as described above, should remain as it is. We provisionally propose, however, for critical comment, that in addition to the question of whether the victim has consented to the relevant acts or risk of injury, other circumstances should be considered that might render such consent ineffective in law. We review in the next following paragraphs what those circumstances might be.

Fraud

26.1 Where the consent of the victim is induced by fraud or misrepresentation on the part of the defendant, it seems quite wrong that such consent should give the defendant a defence to a charge of assault or of any other offence against the person. We suggest that the test should be, and should be no more than, whether the fraud or misrepresentation induced the victim's consent.

26.2 That would mean that fraud as to *any* aspect of the transaction, and not merely as to its "nature and quality", would render the consent inoperative, if it was the fraud that caused the consent to be given. Thus, for instance, on this test it seems clear that *Bolduc and Bird*[209] would have been decided differently. There would, however, be no absolute rule that, for instance, fraud as to the identity of the defendant would necessarily disqualify the victim's consent from consideration. By contrast to the presumptions that are reasonably made in respect of sexual intercourse, the identity of the party inflicting injuries in the circumstances of *Brown*, and a fortiori the identity of a tattooist or religious superior, may not be important to the victim's consent. That would be a question of fact to be decided in each separate case.

26.3 However, if that approach commends itself, it will be necessary to make quite clear that it is indeed intended to override the antique rule based on the nature and quality of the accused's acts. We say that because in 1982 the Canadian Criminal Code was amended to provide that for the purpose of the offence of assault "no consent is obtained where the complainant submits or does not resist by reason of... fraud".[210] It appears, however,

[208] As was attempted in the immediately following case of *Maurantonio* (1968) 65 DLR (2d) 674, where the accused secured the consent of the prosecutrix to "treatment" of an intimate nature by falsely representing himself to be a doctor. Hartt J, speaking for the majority of the Ontario Court of Appeal, held, at p 682, the "nature and quality" of the act to be not merely physical touching, but as including "those concomitant circumstances which give meaning to the particular physical activity in question". Laskin JA, dissenting, held, a fortiori of *Bolduc and Bird*, that there had been no mistake as to the actual act involved, the women concerned having been fully aware of the nature of the physical acts done to them, albeit only accepting them as medical treatment.

[209] See para 25.4 above.

[210] Canadian Criminal Code, s 244(3)(c).

that that provision is regarded as not having exorcised the ghost of "nature and quality".[211] We envisage a change of a more radical nature, as explained in paragraph 26.2 above.

Mistake

27.1 The proper approach to "spontaneous" or self-induced mistakes, not induced by fraud or misrepresentation, is more difficult to determine. Whereas it is relatively easy to see that misleading conduct on the part of the assaulter should deprive him of a defence based on a state of mind that he has wrongly induced, the merits of the case are more obscure when he is innocent of the consenter's mistake.

27.2 At the moment the law, again so far as it can be stated with any confidence, seems to be controlled by the same limits as to relevant mistake as apply in the case of fraud; which, if fulfilled, appear to disqualify the consent whatever the origin or cause of the mistake.[212] That approach seems to be neither sensible nor just. The "assaulter" should not be guilty of a crime just because of a mistake, of any sort, on the part of the victim of which he is not aware. We suggest, somewhat dogmatically, and for comment, that in order to balance fairness to the defendant with reasonable protection for the victim the rule should be:

1. No mistake on the part of the victim should be operative unless it caused the victim to consent to the risk or impact when otherwise he would not have done so;
2. If, but only if, the defendant knows that such a mistake has been made he will be prevented from relying on the victim's consent as a defence.

Duress and force

28.1 "The line between using force to overcome a woman and using a serious threat to prevent her from offering resistance is too fine to be the basis of a legal distinction".[213] This statement expresses the widely accepted view that consent induced by "duress" should not ground a defence.[214] If the accused seeks to defend himself from a charge of using force, he can hardly do so if he has induced "consent" to that force by another act of force.

28.2 We believe that this disqualification should be stated widely, and encompass both force and threats of force, directed not only at the complainant but also at any other person.[215] Moreover, the careful limitations placed on the *defence* of duress (for

[211] D Stuart, *Canadian Criminal Law* (2nd ed, 1987), at pp 477-478, citing the view of the British Columbia Court of Appeal in *Petrozzi* (1987) 13 BCLR (2d) 273.

[212] See para 25.3 above.

[213] *Martin* (1980) 53 CCC (2d) 250 at p 256.

[214] Smith & Hogan, *op cit*, pp 406-407.

[215] This is the formulation of the Canadian Criminal Code, s 244(3)(a)-(b).

instance, that the accused could not reasonably have reacted otherwise to the duress)[216] are not appropriate here. It does not lie in the mouth of someone who has obtained another's consent to violence by a threat of force to say that the consenting person could or should have resisted the threat.

28.3 We therefore propose that the disqualification should be simply stated, in respect of any consent induced by force or threats of force. We also suggest, however, that the law should go further, and omit in this case any requirement of a proved causal link between the threats and the consent. It is arguable that a person who resorts to such threats in order to obtain another's consent to be attacked should be deprived of any defence based on consent whether or not he was successful in his aggressive and violent threats. We invite comment on this point in particular.

Other threats

29.1 The foregoing relates to threats of violence. More problematical are cases where consent has been induced by other and less drastic threats; or as a result of statements that might be interpreted as a promise rather than a threat.

29.2 The notorious example of this problem in the books is the Rhodesian case of *McCoy*.[217] An air hostess broke a company rule, and her manager offered her a caning as an alternative to disciplinary action involving loss of pay. She accepted the caning, which was inflicted in humiliating circumstances. The manager was convicted of assault, the court holding, at page 10H, that "the complainant's consent was not real in that she did not give it freely and voluntarily". However, the reality is that in the normal understanding of the word, the air hostess did consent to be beaten: the question is whether consent obtained by threats should exculpate her threatener and beater. We provisionally propose that it should not; and that consent obtained by anything that can be described as a threat should not be effective in law.

29.3 We invite comment on that approach, which involves putting threats on a different plane from promises, blandishments or other inducements. We recognise that in other areas of the law, conspicuously the law of interference with contractual relations, some difficulty has been experienced when the concept of a "threat" has been treated as approaching a question of law.[218] However, where the question of threat has been treated only as a factual element in a legal concept, for instance that of making a demand with menaces in the law of blackmail, there has been little difficulty in treating the existence of a threat as simply a question of fact.[219] A threat, so recognised, is a

[216] See Law Com No 218, at paras 29.11-29.14.

[217] 1953 (2) SA 4.

[218] In particular, as to whether it is a "threat" to intimate that one is going to do what one lawfully may do: see Atkin LJ in *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40 at p 87.

[219] See eg Lord Atkinson in *Thorne v Motor Trade Association* [1937] AC 797 at p 806.

serious interference with the victim's discretion in the way that a mere inducement is not, and for that reason the defendant should not be allowed to rely on it. We suggest that a law making the distinction between threat and promise will be workable, and fair to the accused, bearing in mind that it will be for the prosecution to establish that a "threat" has been made. On the other hand, however, if any other external influence or circumstance were allowed to vitiate the legal effect of consent, it would be extremely difficult to operate a law based on consent at all.

29.4 One further case that might be separately identified, as it is in the Canadian Criminal Code,[220] is consent obtained by the exercise of authority on the part of the defendant. We are minded to think, though we invite comment, that the defendant should not be allowed to rely on the consent of another obtained by his own misuse of power.[221]

Misunderstanding of the nature of the act; and youth

30.1 In a few cases alleged consent has been ruled out of consideration because of lack of understanding on the part of the victim. The issues in the cases[222] have been somewhat obscured by their having involved young victims; but the rule that they apply is in truth no more than that a person does not as a matter of fact fulfil the basic requirement that he consents to the relevant act or risk[223] unless he knows what that act or risk is.[224]

30.2 For that reason, some questions must arise over the outcome of *Burrell v Harmer*,[225] where consent was held not to be a defence to a charge of assault occasioning actual bodily harm where D tattooed boys aged 12 and 13, causing their arms to become inflamed; on the ground that they were unable to understand the nature of the act. The court was probably, and in policy terms no doubt rightly, concerned to protect children from being tattooed, an objective more effectively achieved two years later by Parliament by the Tattooing of Minors Act 1969. It seems possible that the factual assumption which was made to achieve that end was not well-founded.

[220] Section 244(3)(d).

[221] Cf the old case of *Latter v Braddell* (1881) 50 LJQB 448, where a maidservant was held to have validly consented to a medical examination tearfully undergone on the orders of her mistress. "She may have submitted under an erroneous notion of law, but it was not through fear of violence": *per* Bramwell LJ, at p 448.

[222] Eg *Day* (1841) 9 C & P 728; *Lock* (1872) LR 2 CCR 10; *Burrell v Harmer* [1967] Crim LR 169.

[223] See para 25.1 above.

[224] "[T]hough there was submission on the part of the children, I do not think that there was any consent; for they were so wholly ignorant of the nature of the act done as to be incapable of exercising their will one way or the other": Kelly CB in *Lock* (1872) LR 2 CCR 10 at pp 12-13; "Mere submission by one who does not know the nature of the act done cannot be consent": Quain J, *ibid*, at p 14.

[225] [1967] Crim LR 169.

30.3 Consent given by minors, or other vulnerable groups, nonetheless raises difficult questions of policy. We incline to think that special rules should render inoperative consent given in some such cases. While some activities commonly consented to by children, such as ear-piercing and *genuine* childish horseplay,[226] may not be positively desirable, they are not objectionable to the extent of necessarily incurring criminal liability. In certain circumstances, therefore, while bearing in mind that children will not always have the necessary understanding to enable them to give valid consent, the consent of the child should operate to prevent such activities from constituting criminal assaults. This approach accords with that taken in other areas, in particular rape,[227] and medical treatment,[228] where the consent of children is, when particular conditions are met, recognised as relieving the accused from criminal liability.

30.4 We provisionally propose, therefore, that where consent is given by a child under sixteen, two separate questions must be addressed;

(i) First, was the child capable of giving consent. Following the test proposed by Lord Scarman in relation to medical treatment in *Gillick*[229], the tribunal of fact must consider whether the child concerned had sufficient understanding and intelligence to give his consent. This will depend both on the age and maturity of the child as well as on the seriousness and implications of the acts in question. So, for example, while a child of 14 may be competent to decide whether or not to have his ears pierced, the same child may not be capable of consenting to a more serious procedure, such as a tattoo.

(ii) Only when it has been decided that the child was capable of giving consent to the act or risk in question, should it further be asked whether they did in fact give their consent.

[226] We refer here to cases of genuine childish horseplay where there is no likelihood or intention to cause bodily harm, in contrast to the extended category of horseplay which has emerged from the cases: see paras 37.7-37.8 below.

[227] "In the case of a prosecution charging rape of a girl under sixteen, the Crown must *prove* either lack of her consent or that she was not in a position to decide whether to consent or resist." *per* Lord Scarman in *Gillick v West Norfolk Area Health Authority* [1986] AC 112 at pp 186H-187A. Provided a girl under sixteen is capable of understanding the nature of the act, her consent to sexual intercourse can, therefore, prevent the intercourse from being rape. The accused may still, of course, be guilty of the statutory offence of having intercourse with a girl under sixteen, under s 6 of the Sexual Offences Act 1956, which does not depend on the absence of consent.

[228] The majority of the House of Lords in *Gillick v West Norfolk Area Health Authority*, *ibid*, held that a child under sixteen may lawfully be given medical advice and treatment, without parental agreement, provided that the child has agreed and has achieved sufficient maturity to understand fully what is proposed. While two later decisions of the Court of Appeal, *In Re R (A Minor) (Wardship: Consent to Treatment)* [1992] Fam 11, and *In Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 65, limit the effect of a child's *refusal* to undergo treatment, and also allow the courts to override a child's consent in certain circumstances, they do not seem to question the basic proposition that the consent of a competent child can prevent treatment of that child from constituting a criminal assault, subject to the court's power to override that consent in limited circumstances.

[229] *Gillick v West Norfolk Area Health Authority* [1986] AC 112 at p 189A.

30.5 This approach, which treats as an independent issue the capacity to consent, is desirable in cases involving children as it stresses the need to consider carefully the ability of each child to understand the nature and implications of the act in question.

30.6 This approach may also have implications for the mens rea of the accused. In cases involving children under sixteen, we provisionally propose that there should be a special rule requiring the defendant to consider whether or not the child is capable of consenting, as well as whether the child does in fact consent. The accused will only be able to rely on the child's consent as a defence if he honestly, but not necessarily reasonably, believed that the child was capable and was in fact consenting to the proposed actions. Such a law would not operate unfairly to defendants. It is not desirable, and should be realised not to be desirable, to fulfil the agreement, or even the desire, of a child to be injured without giving very careful consideration to the ability of that child to consent. However, if the accused honestly even if not necessarily reasonably believed that the child was over 16 he should in our view have the protection of the general rule, mentioned in paragraph 20.2 above, that he is to be judged on the circumstances as he believes them to be. Therefore, if he believes that he is dealing with an adult, he should be able to rely on that person's consent whether or not he addressed his mind to the question of capacity.

Summary

31.1 We can summarise our provisional proposals on the issue of reality of consent as follows.

1. In deciding whether the victim has consented to the injury or risk involved, "consent" should be given its normal meaning (paragraph 25.1).

2. That consent will however be rendered ineffective in law by the presence of a number of defined circumstances (paragraph 25.5). Those circumstances are provisionally proposed in sub-paragraphs 3 to 8 below.

3. Where the victim's consent is obtained by fraud on the part of the defendant as to any aspect of the transaction (paragraph 26).

4. Where the victim consents because of a mistake as to any aspect of the transaction, and the defendant is aware of that mistake (paragraph 27.2).

5. Where the victim consents because of force or a threat of force exercised by the defendant against any person (paragraph 28.2).

6. Where the defendant, in order to obtain the victim's consent, exercises force or a threat of force against any person, irrespective of whether that force or threat was causally effective in obtaining the victim's consent (paragraph 28.3).

7. Where the victim consents because of any threat made by the defendant (paragraph 29.3), or because of any exercise of authority by the defendant (paragraph 29.4).

8. Where consent is given by a person under the age of sixteen who does not have sufficient understanding and intelligence to be capable of giving consent (paragraph 30.4). Comment is invited whether other such vulnerable groups should be identified.

The European Convention on Human Rights

Background

32.1 The appellants in *Brown* argued that their convictions had been inconsistent with requirements of the European Convention on Human Rights (the Convention): principally[230] that the criminalisation of sexual behaviour in private breached article 8:

> "1. Everyone has a the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others."

32.2 As the Convention is not directly effective to create individual rights in United Kingdom domestic law, these arguments could not be conclusive in *Brown*. They were however rightly taken seriously by the House, and must be reviewed in any law reform exercise, since the United Kingdom has an obligation in international law to conform its domestic law to the requirements of the Convention.[231]

32.3 The impact of the Convention on the problems addressed in this Paper is limited because the Convention and its jurisprudence does not create - indeed, it positively disclaims -any general power to review the reasonableness of the law of the contracting states. Accordingly, as Lord Mustill pointed out,[232] the issues have to be discussed within the straitjacket of the particular rights protected by the Convention, in this case the right to privacy. That is liable to distort the application of policy considerations in any particular case, as Lord Mustill thought it had done in *Brown*. And it also renders difficult any consideration of the impact of the Convention on the wide field of activity with which we are concerned in this Paper since, as we have emphasised, the law on consent to offences

[230] It was somewhat faintly argued that the convictions had been in breach of article 7 of the Convention, which forbids conviction in respect of conduct that did not constitute an offence at the time at which it was committed. Since the House did not change the law, but applied the test formulated at the latest in 1980 in *Attorney-General's Reference (No 6 of 1980)*, that issue did not arise on the facts: see eg *per* Lord Lowry, [1993] 2 WLR 556 at p 583H, and *per* Lord Mustill, *ibid*, at p 598F-H. We do not pursue that aspect further, both for that reason and because it does not raise any issue relevant to our present concern of law reform.

[231] "The Contracting Parties have undertaken... to ensure that their domestic legislation is compatible with the Convention, and, if need be, to make any necessary adjustments to this end": European Commission on Human Rights, *Yearbook*, vol 2, at p 234.

[232] [1993] 2 WLR 556 at p 599A-C.

against the person is not and should not be affected by whether the acts complained of take place in public or in private.[233]

32.4 That said, however, conduct of the type with which we are concerned is much more likely to take place in private than in public, as in fact did the conduct complained of in *Brown*. If, therefore, the Convention lays down special rules for the protection of privacy, that prevent the criminalisation of consensual assault or injury on the grounds that that is an invasion of the privacy of the injurer, then this must clearly be taken into account in formulating any law about such consensual assault.

32.5 We are therefore reviewing the Convention issues in this Paper, emphasising as we do so that nothing that we say can be authoritative as to the interpretation of the Convention, and much less as to the view that the United Kingdom government might take in any proceedings that raised these issues. One at least of those convicted in *Brown* has made an application in respect of that conviction to the European Commission of Human Rights[234] and that application, if declared admissible by the Commission and then pursued before the Court of Human Rights, may, in the admittedly somewhat distant future, yield authoritative guidance on these questions.

Article 8 and privacy

33.1 Privacy is, perhaps understandably, not defined in the Convention. It is, however, not limited to the more obvious rights of protection from being spied on, or the protection of the home from invasion or one's papers and private information from interference by telephone tapping or interception of mail. It also includes, in the suitably cautious words of the Commission, "to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality."[235] That wider view of privacy has led, in particular, to laws criminalising private homosexual conduct between adults[236] being found to be contrary to Article 8,[237] as concerned with "a most intimate aspect of private life".[238]

[233] See paras 21.1-21.2 above.

[234] *Application by Colin Laskey* (PG 0281 of 1993).

[235] *European Commission of Human Rights, Decisions and Reports*, vol 5, at p 87.

[236] In *Dudgeon*, n 237 below, the prohibition of consensual homosexual conduct between males under the age of 21 was found not to be in breach of the Convention, being justified under Article 8(2) as necessary for the protection of morals.

[237] *Dudgeon v United Kingdom*, Series A, No 45, (1981) 4 EHRR 149; and *Norris v Ireland*, Series A, No 142, (1988) 13 EHRR 186. Both cases were followed in *Modinos v Cyprus*, Series A, No 259, (1993) 16 EHRR 485.

[238] *Dudgeon*, at para [52]. The right to develop relationships with others has, however, also been relied on as the foundation for an interpretation of the concept of "private life" in article 8 as extending to protection of a lawyer's professional premises from unreasonable search: *Niemity v Germany* Series A, No 251-B, (1992) 16 ECHR 97 at para [29].

33.2 It does not, however, follow that the conduct in *Brown* would be viewed in the same way. In the cases just mentioned the Court was strongly influenced by the private nature of *sexual* behaviour, seeing it as "an essentially private manifestation of the human personality".[239] The criminal charges in *Brown*, however, accused the defendants of violence. The objection was not simply in respect of sexual deviation.[240] Violence is certainly not essentially private in nature; and when assessing conduct of that more general nature it would be very odd if it were exculpated by the Convention when sexually-motivated, but not otherwise.

33.3 There is a further consideration. In determining whether a national law is incompatible with the Convention, a "margin of appreciation" is allowed to member states to determine what is reasonable and acceptable in their own particular system. That jurisprudence is usually articulated in terms of the various exceptions provided by (in the case of Article 8) Article 8(2); but the application of the principle would seem to be more general than that. The terms and extent of this latitude are difficult to state with certainty, since they vary according to the Court's view of the importance of the Convention right involved, and the need for and reasonableness of the national provisions said to infringe it.[241] However, one general principle may be that the margin of appreciation tends to be broad if the applicant's case is one in which some restriction of his rights would normally be expected.[242] We venture to think that in any democratic society rules are to be expected that control violence, even consensual violence; and that some care is likely to be exercised in saying that such rules unreasonably infringe rights of privacy.

33.4 That must necessarily be a matter of speculation. The extent and severity of particular national laws is clearly a matter for legitimate debate under the Convention. But as pointed out above, that debate is distorted in the present case by its having to be conducted in relation to the single value of privacy, which is largely irrelevant to the values and policies that should control a law of offences against the person. We cannot think that it could be argued that rights of privacy require the national state to withhold the criminal law from all consensual violence, whatever its extent and severity. The issue, therefore becomes, as in the reform of the English domestic law, one of determining where the line should be drawn. But, as we have seen, the Convention focuses on *privacy*; and it would in our view be extremely difficult, simply applying the Convention view of that requirement, to reach any proper conclusion as to the permissible limits of consensual violence, either in private or, a fortiori, more generally. It follows that even if the European authorities feel able to enter upon this difficult enquiry, we

[239] *Dudgeon*, at para [60].

[240] As forcefully put by Lord Templeman, [1993] 2 WLR 556 at p 566D: "I do not consider that article 8 invalidates a law which forbids violence which is intentionally harmful to body and mind. Society is entitled and bound to protect itself against a cult of violence."

[241] For a survey and analysis see AH Robertson and JG Merrills, *Human Rights in Europe: A study of the European Convention on Human Rights* (3rd ed, 1993), at pp 199-203.

[242] *Ibid*, at pp 199-200.

doubt whether conclusions will emerge that illuminate, and much less that dictate the solution to, our present problem.

Conclusion

34.1 The most that application of the Convention's jurisprudence might produce, therefore, is a special rule relating to *sexual* violence; or, possibly, to any violence committed in private. There are, however, difficulties about taking even those limited steps, which may become more apparent as the proceedings under the European Convention are pursued. In our judgement there is every reason for the English domestic authorities to pursue the present and more general enquiry unconstrained by these possibilities; and that is the basis on which we proceed in this Paper.

THE SPECIAL CASES

Introduction

35.1 We now consider what should be done about the various special categories, already discussed at length earlier in this Paper. Following the analysis suggested in paragraph 23 above, we deal with the issues in the following order:

1. The special cases if the general law remains in the terms confirmed in *Brown*.

2. The special cases if the general law is reformed along the lines provisionally proposed earlier in this Part.

3. As a separate issue, sports and games.

Special cases under the present general law

Background

36.1 If the general law remains in its present state, serious attention has to be paid to the cases that would be criminal under that law unless specially exempted. There are considerable difficulties in this exercise, because to adopt the present general law as a conscious act of policy would indicate that there are strong policy reasons for keeping permitted consensual violence at a very low level; and therefore that equally strong reasons are needed in any given case for departing from that rule.

36.2 There is also the further difficulty that the courts are not equipped to investigate the policy implications of new cases, as was conspicuously demonstrated, and acknowledged by the House to be the case, in *Brown*.[243] While, therefore, in theory it is open to the judges to acknowledge new grounds of defence, including new additions to the existing special categories,[244] it is likely to be difficult for judges in any given case to be clear

[243] See para 8.1 above; and the remarks of Lord Mustill cited in n 40 to para 6.4 above.

[244] While it is generally acknowledged that the courts have no power to create new *offences*, it remains open to the judges to recognise new grounds of defence: see the commentary on the Commission's Draft Code, Law Com No 177 (1989), at para 12.41(ii). That licence would seem to apply a fortiori to the recognition of a new category cognate to existing categories of

that that step should be taken. The approach of leaving these problems to be worked out by the common law is therefore likely to result in there being little or no addition to the present categories of exception.

36.3 We confess that we find this problem one of some difficulty; and that its difficulty is one reason that attracts us to a change in the present general law. However, on the premise adopted in this section, that the general rule remains as in *Brown*, we consider, first, what if anything should be done about the present special categories; second whether there are any cases that should be specifically added to their number; and third how the matter should be handled in any legislation.

The present categories

37.1 In paragraph 11 above we have, we hope, set out and addressed all the cases that have been identified in the reported authorities as exempt under the present law. We have made the assumption that none of these cases extend to permitting consent to be given to acts intended to cause, or creating a likelihood of, *serious* harm.[245] That discussion permits us to state somewhat briefly, for consideration by consultees, how we think these cases might be handled in future.

37.2 *Ritual circumcision*,[246] *ear-piercing* and *tattooing*[247] are, understandably, assumed in the present law not to give rise to criminal liability. To make the position entirely clear, however, these cases, and the other special cases, should be subject to the reformed rules as to the nature of the victim's consent, and the limits on the circumstances in which consent is legally effective, that we have provisionally proposed, as summarised in paragraph 31.1 above.

37.3 We have been unable to form any view as to whether it is necessary or desirable for the criminal law to make a special exemption from the general law of assault in the case of *flagellation* and *religious mortification*. We shall welcome comment from those with experience of these matters.

37.4 The category of *dangerous exhibitions* is even more difficult to pin down.[248] We will be interested in receiving more factual information as to how widespread are activities that might be thought to fall under this description. We understand that theatrical and circus performances that threaten mutual hazard to the (human) performers may be increasing in popularity.

defence.

[245] See n 186 to para 17.4 above. This limitation may not, however, be correct in the case of "horseplay": see n 141 to para 11.15 above.

[246] This reference, like the reference in the cases can be assumed to be, is to *male* circumcision. For female circumcision, see the Prohibition of Female Circumcision Act 1985.

[247] See para 11.21 above.

[248] See paras 11.16-11.20 above.

37.5 In some cases, of the "William Tell" type, where the performer is wholly confident of his skill, it might be argued that in any event it was reasonable for him to take the risk involved. In other cases, where the infliction of injury would be criminal without consent on the part of the victim, decisions have to be made as to the extent to which the demands of public entertainment justify the creation of a risk of personal injury.

37.6 It will be recalled, in addressing this issue, that it arises on the assumption that the *general* rule remains as stated in *Brown*, that it is not possible to consent to an act likely to do injury.[249] It is essentially a matter of policy, judgement or taste how far the entertainment of third parties should be a reason for overriding that general rule. We invite comment on that point, particularly from persons who feel that their professional or social activities would be inhibited by a law that ceased to provide an exemption from criminal liability for those injuring others in the course of vaguely-defined "dangerous exhibitions".

37.7 Like Lord Lane CJ in *Attorney-General's Reference (No 6 of 1980)* we see no merit in protecting *casual fighting*, above the level of "minor struggles",[250] and agree that (on the assumption that as a general rule consent to any injury should not be effective in law) such fighting should not form a special case. Childish ragging and scuffling is likely to be exempt even under the present general rule, as not being likely or intended to cause injury.

37.8 Recent authority[251] sends a warning about the recognition of a category as obscure in its justification, and in its limits, as *horseplay*. We provisionally propose that that exemption should not be further contemplated. There is no reason, and indeed no basis, for distinguishing "horseplay" from casual fighting. And genuine (childish) horseplay will fall outside the general rule in any event,[252] for the same reason as do "minor struggles".

Additions to the present categories

38.1 If a conscious decision is taken to leave the general rule in its present stringent form, there is a policy difficulty for the legislature as much as for the courts[253] in justifying exceptions from that rule. A number of cases can be suggested where exception might be desirable; but that would require special reasons to depart from a consciously adopted general rule. The cases already acknowledged by the law, and which we see no good reason to alter,[254] give no guidance as to their further extension by analogy, since they

[249] See para 36.3 above.

[250] See paras 11.1-11.3 above.

[251] See paras 11.8-11.15 above.

[252] See para 30.3 above and n 226.

[253] See para 36.1 above.

[254] See paras 37.2-37.3 above.

seem to have no unifying factor; and in all the cases that might be suggested for addition to the list for other reasons, good grounds for departing from the basic premise that the law only permits a very low level of consensual violence are hard to find.

38.2 Thus, in the case of sexually-motivated injury, as debated in *Brown*, it is difficult to see why, in the context of a general law that would be very restrictive as to permitted consensual injury, the presence of a sexual motive should alter the case. Such a distinction would also involve rejecting the philosophy of *Donovan*,[255] which is one of the main sources of the present general rule.

38.3 A further category might be the giving of "medical" treatment by persons who were unqualified, and who thus did not benefit from the exemption for lawful medical treatment.[256] But it is far from clear that such conduct should be encouraged; as it might be thought to be if it was made the subject of a special exception.[257]

38.4 That, indeed, is the dilemma which is posed by the present state of the law. In *Brown* the judges who did not adopt that law were able to emphasise that their conclusion on the facts of that case followed from their view of the proper limits of the law of offences against the person, and not from any approval of the appellants' conduct.[258] But if special exemptions are created from the present general rule, it is hard to see that that will not connote specific approval of the exempted practices.

38.5 We are not satisfied that there are any practices that should qualify to be added to the present list of special cases, but we invite argument to the contrary. In particular, there may be some traditional practices, regarded as acceptable among minority communities in this country, with which we are not familiar, and we would be pleased to receive information about these. Subject to this understandable exception it is perhaps noteworthy in this respect that, so far as we are aware, *Brown* is the first case in which

[255] See in particular para 5.7 above.

[256] Although there is only a very limited restriction on the practice of medicine and surgery by unqualified people (*Halsbury's Laws* (Fourth Edition, Reissue), vol 30, para 26, n 1), such conduct is subject to stringent limits as to nomenclature and advertisement (*ibid*, paras 26-27). It would be difficult for an unqualified person purporting to practise orthodox medicine or surgery to claim that his activities were "lawful" in the way that the medical treatment exception seems to demand. In the case of ancillary or alternative forms of medicine, there will often be a recognised system of qualification, which practitioners should respect. An activity like acupuncture, if conducted with proper skill and care, would seem to be of the same status as ear-piercing or tattooing. These difficulties would disappear if the general law were reformed: see para 40.2 below.

[257] If the treatment were given in an emergency, and when no professional help was to hand, it would, subject to the display of reasonable care, benefit from the defence of necessity: which in appropriate circumstances overrides the general requirements of the law of assault.

[258] "[T]he issue before the House is not whether the appellants' conduct is morally right, but whether it is properly charged under the Act of 1861. When proposing that the conduct is not rightly so charged I do not invite your Lordships' House to endorse it as morally acceptable. Nor do I pronounce in favour of a libertarian doctrine specifically related to sexual matters.": *per* Lord Mustill, [1993] 2 WLR 556 at p 599G-H.

it has been thought necessary to argue for any addition to what were thought, at the time of *Attorney-General's Reference (No 6 of 1980)*, and in discussion thereafter, to be the cases needing special exemption from the general rule.[259]

Legislative form

39.1 If the general rule of *Brown* is confirmed in legislation, it seems desirable that there should be specific reference in that legislation to such of the special cases as survive.

39.2 It would, therefore, be necessary specifically to list ritual circumcision, ear-piercing, tattooing, flagellation and religious mortification; and provide that they were permitted when not likely or intended to cause serious injury. In any legislation would have to be added the categories of lawful medical treatment and lawful correction, that we have not addressed in this study; and boxing.[260] Applying the logic of the argument suggested in paragraph 38 above, this list should be stated to be closed. If that seems too radical a step, we consider that it should at least be made clear that fighting and horseplay cannot be added to the list by judicial action.

Special cases under a reformed law

40.1 The difficulties that we have perceived in dealing with the special cases under the law as laid down in *Brown* largely disappear if the general law were to be reformed in the terms provisionally proposed earlier in this Paper, and summarised in paragraph 22.1 above.

40.2 That is because that law would treat as effective consent to the likelihood of injury, but not of serious injury. Since in (almost) none of the special cases is consent to the likelihood of serious injury within the limits of the exception, the need for the special cases will simply fall away. Special considerations however apply in the case of lawful sports and games, to which we now turn.

Lawful sports and games

Introduction

41.1 The acknowledged exemption in respect of injuries caused during sports has to be maintained, in some form, if it is to be possible to continue to play "contact" sports. The public interest in achieving that outcome does not need to be stated.

41.2 Special provision is needed if the general law remains as stated in *Brown*. It is, however, necessary to make special provision even if that law is reformed as we provisionally propose in this Paper. There are two reasons for that.

41.3 First, the general rule, although encompassing consent to risk or likelihood of injury, as well as consent to specific and deliberate acts, still has as its main context deliberate and injurious acts by the defendant. As we have pointed out above, it may be artificial to talk

[259] Ie the cases specifically listed by Lord Lane CJ, plus "horseplay".

[260] See para 10.22 above.

of participants in games consenting to the risk of injury, as opposed to consenting to take part in the game; and indeed the proper way of looking at the case may well take the form of the courts recognising a set of objective criteria for the legality of games, instead of looking for consent, actual or implied, on the part of the players.[261]

41.4 Second, one of those objective criteria, acknowledged by the present law, and seen as valuable by courts, is that no lawful sport should encompass the intentional infliction of injury.[262] If that feature of the law is to be preserved, it requires a departure from the general rules proposed in paragraph 22.1 above: where victims are free to consent to intentional injury, provided that that injury is not serious.

The policy issues affecting a sports and games exemption

42.1 The present law tends to be stated simply in terms that special rules affect "lawful sports and games", without much analysis of the implications of that approach. It may well help consultees in commenting on this aspect of the Paper if we to try to uncover some of the policy issues that may be involved.

42.2 First, some thought has to be given to what constitutes a "lawful" sport or game for this purpose. If any informal group of people can invent their own entertainment ad hoc, and then claim simply to have been playing a game, conduct like that in *Aitken*,[263] or of the casual fighters in *Attorney-General's Reference (No 6 of 1980)*,[264] will attract the sports and games exemption. Indeed, those participating in the activities reviewed in *Brown* might, on that approach, have claimed that it was all just a game. Nevertheless, a *definition* of sport for this purpose seems difficult or, more likely, impossible to achieve; and too restrictive an approach to what will count as a sport, or as participation in sport, may unreasonably extend the reach of the criminal law.

42.3 Second, however, even if an activity is in form a "sport", that cannot be allowed to inhibit the criminal law from holding that the rules of that sport permit unreasonably dangerous conduct.[265] Thus, in the case of the newly emerging martial arts activities that we mentioned in paragraph 10.23 above, unless these are deemed to be a specially protected case analogous to boxing, the intentional infliction of injury remains criminal: and it should not be an answer to that charge that this particular sport permits and indeed encourages that conduct.

[261] See paras 10.9 and 23.3 above.

[262] See paras 10.12-10.13 above.

[263] [1992] 1 WLR 1006: see para 11.10ff above.

[264] [1981] QB 715 at p 719C-D; see para 11.2 above.

[265] In the present law, this rule has always to be subject to what we assume to be the special case of boxing: see paras 10.19ff above.

42.4 Third, while it is important not to inhibit proper and healthy sporting activity, at the same time it is equally important to reinforce the attitude, now firmly supported by the courts under the present law, that sport is not an excuse or cloak for gratuitous violence.[266] In that connexion, special attention needs to be paid to reckless as opposed to intentional injury. That has been a potential head of criminal liability during the playing of sport for more than one hundred years, since the clear and unchallenged judgment of Bramwell LJ in *Bradshaw* in 1878;[267] but the difficulty comes in determining what, in the various contexts in which sports and games are played, will consist of *unreasonable* risk-taking for the purposes of the modern law of recklessness.[268]

A scheme for sports and games

43.1 Bearing these considerations in mind, we suggest, for the critical comment that we particularly hope to receive on this part of the Paper, the following scheme: though it might be more accurate to describe what follows as a general approach to the problem, rather than anything properly schematic.

44.1 As to the ambit of the sports and games exemption, we propose the following rules or principles.

44.2 We do not think that in practice the courts will have much difficulty in identifying what is and what is not a sport.[269] However, the principle is that the exemption should extend to any activity conducted under the rules[270] of a recognised sport, "sport" for this purpose being an organised activity undertaken for purposes of recreation. The following further considerations arise.

44.3 First, as we have pointed out in paragraph 42.3 above, the mere fact that the participants claim to be playing a rule-based sport does not inhibit the court from holding that the activity in which they are engaging is unreasonably dangerous.

44.4 Second, although the root idea of a sport is that it is engaged in for healthy recreation, a particular sport does not lose the benefit of this exemption just because it is being played by professionals for whom it is a business or source of reward. And, on the other

[266] See para 10.13 above.

[267] See para 10.14 above.

[268] See paras 10.15-10.17 above.

[269] We avoid the characterisation *lawful* sport, which seems to have crept into the law mainly in order to exclude prize-fighting. The use of the term "lawful", without further explanation, gives no guidance as to the basis on which lawfulness is determined.

[270] It would seem to be of the essence of a "sport", at least for present purposes, that it is conducted according to rules, which are not simply made up, or alleged to have been made up, by the participants as they go along. We refer in this connexion to the observations of Lord Jauncey of Tullichettle in *Brown*, cited in para 10.1 above. However, while the intervention of a referee is, as his Lordship says, envisaged by such a scheme of rules, for the reasons indicated in the text below the presence of a referee should not be a precondition to the ability to assert the exemption in a particular case.

side of the coin, if the players are genuinely and recognisably engaging in a particular game, they should not lose the benefit of the exemption just because they are playing in an informal setting, or not following the rules in every detail: for instance, in a scratch game of football in a local park or, even, in the street. However, in each of these cases, at the extremes of the spectrum of sporting activity, the circumstances of play may affect the obligations of the players under the rule of reasonable risk-taking: see paragraphs 46.1-46.4 below.

44.5 Third, sportsmen need to practise, by playing or partly playing the game. Any such activity that is reasonably to be regarded as ancillary to the playing of a recognised game should be included in the exemption: for instance, the practising of tackling in rugby football.

45.1 The intentional infliction of injury will always be criminal, as we believe the law already provides: see paragraphs 10.12-10.13 above.

46.1 It will also be criminal to inflict injury while playing sport by an act of subjective recklessness. In assessing whether the defendant had been reckless, the court will apply the normal general test: that is, whether the defendant took a risk of injury of which he was aware, and in the circumstances it was unreasonable for him to take that risk. The decision on the reasonableness of the defendant's conduct is very much a jury matter. It will be much influenced by the fact that the injury occurs during sports and games; and we suggest, by the following other matters

1. Whether the injury was inflicted in the course of play; as opposed to being inflicted after play had ceased, or when the parties were not involved in actual play ("off the ball"). Injuries inflicted outside the course of play are unlikely to benefit from any special considerations applying to sports and games.

2. Where injury is inflicted in the course of play, a party will be reckless if he takes an unreasonable risk, bearing in mind the requirements of the game, the general expectations of the persons playing it, and the ease with which he could have achieved his aim within the game by other means.

3. In assessing whether the player's conduct has been reckless, the conformity of his conduct to the rules of the game, if the court judges those rules to be reasonable,[271] will be persuasive but not conclusive as to the reasonableness of his conduct.[272]

46.2 We may mention some further considerations that might arise in connexion with whether a player had been reckless.

[271] Cf para 42.3 above.

[272] Cf, for the current law, paras 10.10-10.11 above.

46.3 Attention should be paid to the experience of the player, to his understanding of the implications of his conduct, and to the need for him to play in a certain way. Thus, first, in the case of most games one cannot learn to play the game without actually playing it; and in some sports, such as lacrosse or hockey, inexperienced players may be more at risk of injuring others. But in assessing the *criminal* liability of such players, due account should be taken of the public interest in people learning to play sport, and thus of the reasonableness of some risk being taken when they are learning. Second, however, experienced players, and in particular professionals, understand more clearly the dangers of particular forms of conduct, and also the importance of playing within the rules. We venture to suggest that where professionals injure each other by acts that are forbidden by the rules, and known to be potentially dangerous (such as late tackles in rugby, or elbowing while jumping for the ball in soccer) courts should not be slow to deem such risk-taking unreasonable. Such an attitude would give full weight to the overall value of the game, because it would be directed at conduct that is outside the proper playing of that game.

46.4 The process of participating in sport might be said to involve a certain amount of give and take; but, at the same time, there is a limit to the extent to which criminal sanctions can or should be withheld because of the attitude of the victim. We may give an example. Fast bowling in modern professional cricket is potentially extremely dangerous. To avoid or greatly minimise that danger batsmen are permitted, though not obliged, to wear a variety of protective clothing, particularly helmets. A batsman who declined to protect himself in that way would undoubtedly be creating a situation where a bowler bowling normally would be creating a significant risk of causing serious injury. That is, in the first place, a question for the cricket authorities; but the implication of the scheme that we provisionally propose is that a bowler who continued in his usual way and injured the batsman would be risking criminal liability, because above a certain level of hazard the consent or connivance of the victim is no defence. Similar considerations will apply, with increased force, if very fast, dangerous bowling is permitted in cricket at a lower level than the modern first-class game, particularly if the batsman's ability to cope with very fast bowling is obviously limited.

46.5 We set out all the foregoing considerations in the hope of exciting critical comment on the scheme provisionally proposed here, and on our suggestions as to how it might operate. We hope in particular to receive such comment from those engaged in organised sport.

47.1 We do not think that problems of reality of consent arise in the case of sports and games.[273] However, both the present law and the provisions set out above assume that the players have voluntarily agreed to take part in the sport in question. That may sometimes not be the case: for instance, in schools, prisons or the Army. In our view,

[273] Including the proposed rules about consent given by persons under the age of sixteen: see paras 30.4-30.6 above. These rules would not, therefore, interfere with the solution proposed in this paragraph for the playing of games in schools.

however, the compulsory nature of the game should not prevent the application of the foregoing rules which, it must be remembered, are concerned only with the *criminal* responsibility of the player who inflicts the injury. In the case posited he is to be assumed to be as non-voluntary a participant as his victim, and therefore should not be deprived of the normal sports protection. Whether in the case of injury being suffered in the course of compulsory sport there is any *civil* liability on the part of the organisers of the sport is a quite different question, with which we are not concerned here.[274]

Summary

48.1 Our provisional proposals as to the special circumstances outside the general rule are therefore as follows:

1.1 If the general rule continues to be as set out by the majority in *Brown*, that consent can only be given to acts not intended or likely to cause injury, then the special cases should be limited to ritual circumcision, ear-piercing, tattooing and (perhaps) flagellation and religious mortification and dangerous exhibitions (paragraphs 37.2-37.6 above).

1.2 The present special category of horseplay should cease to be recognised (paragraph 37.8 above).

1.3 We invite comment as to whether further categories should be added to the list (paragraph 38 above).

2. If the general rule is reformed, to permit consent to injury but not to serious injury, there should be no special categories other than that of sports and games (paragraph 40 above).

3. In any event, special provision should be made for sports and games. That should provide that

3.1 The special rules should apply to any activity in the playing of or connected with the playing of a recognised and organised sport.

3.2 In that activity, the intentional infliction of injury should be criminal, as should the reckless infliction of injury. Recklessness should be judged according to the accused's awareness of risk, and the reasonableness of taking that risk in the context of the sport in question.

A range of cases and illustrations are suggested in the context of that scheme in paragraphs 42.1ff above; on all of which we invite critical comment.

[274] Cf *Van Oppen v Bedford Charity Trustees* [1990] 1 WLR 235.

PART IV

QUESTIONS FOR CONSULTATION

We repeat here for convenience the specific questions raised for consultation throughout the Paper. However, we invite critical comment on all aspects of the Paper, even if not specifically addressed by these questions.

I. Is it agreed that the law should place some limit on the degree of injury to which a victim may consent? (paragraph 12.4 above).

II. If so, do consultees support the present general limit, as stated by the majority in *Brown*, that consent is no defence in respect of an act that is intended or likely to do actual bodily harm, or injury?

III. If consultees do not support, or are doubtful about, the rule stated in question II, they are invited to comment on all or any aspects of the alternative rule provisionally proposed, as summarised in paragraph 22.1 above:

1. The defence of consent would extend to consent to the likelihood (see paragraph 18.2) of injury, but not of serious injury. This fundamental change is explained in paragraphs 16-17 above.

2. Because it excludes consent to serious injury, the defence of consent would be potentially available in respect of charges of assault and inflicting injury, but necessarily not in charges of inflicting serious injury (paragraph 19.2 above).

3. The defence would equally not be available where the defendant intended to cause serious injury, whatever offence he was actually charged with (paragraph 18.3 above).

4. Although the defence discourages consent to serious injury, it would be available even if the victim had consented to serious injury if the defendant only inflicted injury (paragraphs 19.4-19.5 above). We suggest, however, that in any case where the defendant *knows* that the victim is consenting to serious injury he should not be able to rely on the defence of consent (paragraph 19.6 above).

5. The defence would be subject to the normal rule that the defendant's liability should be judged on the facts as he believed them to be. The defendant would therefore have the benefit of the defence where he believed the victim to be consenting, even if in fact he was not (paragraph 20.2 above).

6. The law should be the same whether the acts complained of take place in public or in private (paragraph 21.1 above).

IV. Do consultees wish to retain the present rules as to reality of consent, and the matters that render consent ineffective in law (see paragraph 24 above)? Comment is invited on the alternative scheme summarised in paragraph 31 above:

1. In deciding whether the victim has consented to the injury or risk involved, "consent" should be given its normal meaning (paragraph 25.1).

2. That consent will however be rendered ineffective in law by the presence of a number of defined circumstances (paragraph 25.5). Those circumstances are provisionally proposed in sub-paragraphs 3 to 8 below.

3. Where the victim's consent is obtained by fraud on the part of the defendant as to any aspect of the transaction (paragraph 26).

4. Where the victim consents because of a mistake as to any aspect of the transaction, and the defendant is aware of that mistake (paragraph 27.2).

5. Where the victim consents because of force or a threat of force exercised by the defendant against any person (paragraph 28.2).

6. Where the defendant, in order to obtain the victim's consent, exercises force or a threat of force against any person, irrespective of whether that force or threat was causally effective in obtaining the victim's consent (paragraph 28.3).

7. Where the victim consents because of any threat made by the defendant (paragraph 29.3), or because of any exercise of authority by the defendant (paragraph 29.4).

8. Where consent is given by a person under the age of sixteen who does not have sufficient understanding and intelligence to be capable of giving consent (paragraph 30.4). Comment is invited whether other such groups should be identified.

V. Comment is invited on the proposals for the special cases that are summarised in paragraph 48 above.

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